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ST. LOUIS, MO., SEPTEMBER 16, 1892.

The recent meeting of the American Bar Association, held at Saratoga, was of an interesting character. An address was delivered by John F. Dillon, of New York, president of the association, his theme being the most noteworthy changes in statute law made during the year by the various States and congress. The address of John Randolph Tucker, of Virginia, upon a constitutional topic, of which he is a master, was said by those who heard it to be of exceptional merit. Papers were read by John W. Carey, on "Limitation of Legislative Power in Respect to Personal Rights and Private Property," and by William L. Snyder, on "The Problem of Uniform Legislation in the United States." The two gold medals for distinguished services in advancing the science of jurisprudence, were awarded to David Dudley Field, of New York, and Lord Selborne, of England. Probably the most important paper read, or at least that which gave rise to the most interesting discussion, was a report of the committee on international law, as to whether "any" legislation by congress is desirable and practicable to give the courts of the United States jurisdiction over criminal prosecutions for acts of violence to the persons or property of aliens committed by citizens of the United States."

The following resolution, adopted by the committee, was concurred in: "*Resolved*, That in the opinion of this association, it is unnecessary and inexpedient that there should be any legislation by congress to give to the federal courts jurisdiction of crimes against the persons and property of aliens in any case in which such jurisdiction does not exist as to similar cases in which a citizen is the injured party."

The following officers were chosen for the ensuing year: John Randolph Tucker, of Virginia, president; Edward Otis Hinckley, of Baltimore, secretary, and Francis Rawle, of Philadelphia, treasurer.

It is amusing to read the great ingenuity in the use of language by the Supreme Court of Minnesota in the case of Church v. Chicago, M. & St. P. Ry. Co. The plaintiff had been in the employ of defendant as a brakeman for about a year and a half in Iowa, and had returned to his home at Northfield, Minnesota, on a leave of absence. On the day of the accident he went to the depot at Northfield for the purpose of obtaining a pass to resume his work. The defendant owed him wages for services as a brakeman. While plaintiff was waiting at said depot to obtain his pass, a wrecking or construction train of defendant pulled in. The answer of defendant admitted that one Olson, the head brakeman, had charge of the movements of this train when the conductor was absent, and that the conductor was absent attending to other usual duties. This head-brakeman, being the only man present, and in charge of the movements of the train, being well acquainted with plaintiff, and knowing him to be a brakeman for the defendant, ordered him to ride in one of the flat cars of that wrecking train while he, the head-brakeman, "cut it off." Plaintiff complied with the head-brakeman's order, and rode in the car, which had been carelessly loaded with a pair of heavy trucks, unblocked or trigged, which rolled against plaintiff, knocking him from the car, seriously injuring him while riding in the car. There was no evidence of contributory negligence on plaintiff's part, and plaintiff further offered to show that defendant attempted to switch said train in a quick and hurried manner, with an insufficient number of men, and for that reason called on plaintiff to make the third man required to do the switching in a safe and proper manner.

Mitchell, J., in his opinion, says: "While the head-brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority." We always supposed courts of justice placed a broad and liberal construction upon pleadings and admissions, and a head-brakeman, having charge of the movements of the train, was considered a man with a little sense and some discretion in a case of an emergency, which existed in this case, as it appeared this wrecking train was in a hurry to make the switch to pick up a

fallen wreck. This court could as well have said a head-brakeman is nothing but an automaton, who could use his arms and legs, but not his head, even in a case of emergency. "The head-brakeman had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily," says the court. "Emergency" is a well-defined word, and we would like to ask this court what a "present pressing" emergency is.

Again it says: "If any sudden or unexpected emergency should arise, such that the safety of the train demanded an extra force of brakemen, probably it would be held that it was within the implied authority of the conductor to employ them." So far as it appeared in the case, the conductor might have been in New York, or under the platform of the station at Northfield. He was not seen that day by plaintiff, and the head-brakeman was doing the work, and had all the apparent authority of the conductor, and plaintiff, seeing this man in charge of the train, obeyed his orders in assisting doing the switching, and still the court held the plaintiff was a mere volunteer and defendant owed him no duty. The decision in this case seems to be in direct conflict with Johnson v. Ashland Water Co., 71 Wis. 553, 37 N. W. Rep. 823, decided by the Supreme Court of Wisconsin and later affirmed by the same court —77 Wis. 51, 45 N. W. Rep. 807. It is more than probable that attorneys who practice before the Supreme Court of Minnesota would like to have that court's version of what "a present pressing emergency" and "a sudden or unexpected emergency" is supposed to be.

NOTES OF RECENT DECISIONS.

TRADE-NAME — TRANSFER OF THE USE OF NAME AS A TRADE-MARK—GOOD-WILL.—The latest cases on the above subject are Vonderbank v. Schmidt, 10 South. Rep. 616, decided by the Supreme Court of Louisiana, and Fish Bros. Wagon Co. v. La Belle Wagon Works, 52 N. W. Rep. 595, decided by the Supreme Court of Wisconsin. The Vonderbank case was a suit for an injunction. The plaintiff had for many years conducted a hotel in a rented building under the style of "Hotel Vonderbank." He also kept in an adjoining street a restaurant under the name of the "Cafe Restaurant Vonderbank." "Plaintiff represents that the theory upon which he conducted the two businesses was that his hotel on Magazine street was to be a boarding place for the patrons of his restaurant, the two being conducted co-operatively." He subsequently sold the hotel to one Charles Dormitzer, who conducted it for a while unsuccessfully, and afterwards assigned it to his creditors, and an arrangement was then made whereby it was conveyed to the defendant. During the administration of Dormitzer the establishment had been carried on under its original name of "Hotel Vonderbank," or "Vonderbank Hotel." and the use of such name was being continued by the defendant. Plaintiff complained in the action that this was done in violation of his rights, and much to the detriment of his business as a *restaurateur*. The real question litigated was whether the right to use the proper name "Vonderbank" passed impliedly with a conceded sale of the good will of a hotel conducted by Matthieu Vonderbank under the name of "Hotel Vonderbank." The court held that it did not, and the opinion, after voluminous discussion and citation of many authorities from different States, reached the following conclusion: "Our conclusion is that, on reason and authority, the case is with the plaintiff; that the name given to a building in which an hotel is kept, which contains the name of the proprietor, does not constitute an element of good-will, though it may tend to enhance the business reputation of the place or *situs* of the business establishment, which is an ingredient of good-will; that while, under the authorities, such name is a marketable article, and a proper subject of sale, yet it must be expressly understood in the act of sale, and, if no consideration be paid, same may be subsequently recalled. Such transactions, being esteemed to be in restraint of trade, are disfavored in commercial dealings." This case, it will be seen, distinctly admits the salability of business rights in an individual's name, but decides that such a transfer is not to be presumed or taken by implication, but must be expressly shown.

In the Fish Bros. Wagon Co. Case, it appeared that all the property, assets, and business of the firm of Fish Bros., wagon manu-

facturers, passed by successive changes to Fish Bros. & Co.; thence into the hands of a receiver; and thence to the Fish Bros. Wagon Company, a corporation. The Fish brothers remained in the business through all the successive changes, and became directors and officers of the new company, although the majority of stock was owned by others. During all this time the products were variously advertised under the trade-marks, "Fish Bros.," "Fish Wagons," "Fish Bros., Agents," "Fish Bros. & Company, Agents," and the picture of a fish with "Bros." on it or "Bros. & Co." Several years after the organization of the company the Fish brothers withdrew therefrom, and set up on their own account, under the firm name of Fish Bros. & Co. It was held in an action by the corporation against Fish. Bros. & Co., that plaintiff owned the good-will of the old business including the right to use the Fish trade-marks.

Plaintiff's right to the use of such trade-marks was held, however, not exclusive, and, the picture of a fish being regarded simply as a means of designating the surname "Fish" as the founder and originator of a particular make of wagons, defendants may in good faith apply the same trade-marks to the wagons manufactured by them, provided they do it in a way not calculated to induce persons to buy the same for those manufactured by plaintiff. The court also held that defendants have a right to advertise, where they formerly did buisness, their experience and skill in the manufacture of wagons, but they have no right to represent their present business as the same they formerly conducted as the Fish Bros. Wagon Company, or to call the attention of customers to the change of firm name; they being restricted to a reference in such advertisements to their own manufactures.

TRIAL — JURIES—INSTRUCTIONS ALLOWING OR ADVISING COMPROMISED VERDICTS.— In Richardson v. Coleman, 29 N. E. Rep. 909, the Supreme Court of Indiana hold that an instruction to a jury in a civil case containing the proposition that the law "expects and will tolerate reasonable compromise and fair concession" on the part of the jury is erroneous. The full instruction which embodied this proposition was as follows:

Eighth. In addition to the instructions which I have heretofore given you, I now desire to say that you are to take the law as given you by the court, and not to be swayed by any speculations of your own as to what the law is or ought to be. You are, however, the judges of the credibility of the witnesses, and should weigh and consider the evidence, as I have heretofore indicated. It is important to the parties to have this case decided. You will, I trust, in your deliberations be careful to avoid the influence of undue pride of personal opinion. The law, which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and concessions. You will remember, gentlemen, that absolute certainty is not always attainable in human affairs. Neither does the law require it. Whilst it is expected that there will be individual opinion, judgment, and conscience, it is also expected that it will not go the extent of unreasonable obstinacy. You will return to your room, and again confer together, calmly and deliberately reviewing the case under the instructions I have given you.

Mr. Justice Olds said:

The main portion of this instruction we no not deem objectionable. As to the propriety of having the jury brought into court after they had deliberated for nearly twenty-four hours, and giving the instruction, we need not speak, and there is only a portion of the instruction that we deem it necessary to consider. By one clause of the instruction the jury are told that "the law which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and fair concessions." We cannot give our sanction to this statement of the law. By it the jury are told that the law "expects and tolerates reasonable compromise." The law does not expect any compromise on the part of jurors. It expects every juror to exercise his individual judgment, and that, when a verdict is agreed to, it will be the verdict of each individual juror. In arriving at a verdict a juror should not indulge in any undue pride of personal opinion, and he should not be unreasonable or obstinate, and he should give due consideration to the views and opinions of other jurors, and listen to their arguments with a willingness to be convinced and to yield to their views if induced to believe they are correct. But the law does not expect, nor does it tolerate, the agreement by a juror upon a verdict, unless he is convinced that he is right; in other words, unless it is his verdict, a verdict which his conscience approves, and he, under his oath, after a full consideration believes to be right. To say that jurors may compromise upon a verdict is to say that twelve jurors, all differing widely in their views as to what verdict ought to be returned, without any of them changing their views, may agree upon a verdict which is not believed to be right by any considerable number of the jurors, but agreed to as a matter of expediency in order to dispose of the case without the approval of the consciences of any considerable number of the panel approving of it. The instruction tells the jurors the law expects them to make concessions and compromises, and agree upon a verdict which their consciences do not approve, but they should do so as a matter of expediency in order to dispose of the case. The opinion in the case of Clem v. State, sustains the view we have expressed. It is true that decision was rendered in a criminal case, but a verdict whether in a civil or criminal case, must be the verdict of all the jurors. In the case of Houk v. Allen after the jury had been out some twelve hours, the jurors agreed that a certain number of ballots be cast

and counted, and, if either the plaintiff or the defendant received a majority of the ballots so cast, that the verdict should be returned for the party receiving a majority, and the agreement was carried out, and a verdict returned in accordance with the agreement. This court held that a verdict could not be arrived at in that way, and in the opinion it is said: "It is very clear, we think, that the rights of the parties were not determined according to the judgment or consciences of the members of the jury, as was their right, but that the verdict was the mere creature of the agreement to which the jurors bound themselves in advance of the verdict;" and yet this method of arriving at a verdict was but a compromise,—the result of a concession made by the jurors.

BUILDING AND LOAN ASSOCIATION—USURY.—It was held by the Supreme Court of Arkansas in Reeve v. Ladies' Bldg. Association, that the rate of interest to be paid on a building association loan in the usual form, is necessarily uncertain, and contingent on future events, and for that reason the principles of usury are not applicable to loans of this character, and that where a loan is made by a building and loan association on a pledge of its own shares, the statutory rule for computing interest on partial payments has no application to the monthly dues paid on the shares so pledged, and such payments do not bear interest or in any way reduce the amount on which interest is to be paid. Hughes J., says:

This was a bill filed in Pulaski chancery court by appellant against appellee to cancel two mortgages given by appellant, on one block 152, city of Little Rock, to secure payment of dues, etc., on $1,200 of stock, and the other on lots 10, 11, and 12, block 65, City of Little Rock, given by appellant, to secure payment of dues, etc., on $7,000 of stock in appellee's association, on the alleged ground that the transactions were usurious loans, and asking judgment over against said association for all sums paid in on said transactions. Are these contracts usurious? We do not deem it necessary to the determination of this question to decide whether these transactions were sales or redemptions of the shares of the appellant, or transactions in partnership funds, as they are held to be in many of the decisions of the court of last resort. The evidence shows that in each of these transactions there were two separate contracts: First. The taking of shares in the association by the appellant, and the contract to pay for the shares monthly, as stipulated. Second. The sale or transfer of the shares to the association, in consideration of the advance to the appellant of the value of his shares, in anticipation of their par value, at the time when all the shares of all the members should be at par, by reason of the accumulations of the association. When this may be is uncertain, as it must depend upon the prosperity of the association. Whenever these shares are at par the borrowing member ceases to make his monthly payment of dues and interest on the advance made to him. What rate of interest he must pay is uncertain, and cannot be known until the final calculation can be made. The amount he may pay the association may be far less, or it may be more than the sum he receives, with interest thereon at the rate of 10 per cent. per annum. There is, then, in the transaction an element of uncertainty and hazard that seems to exclude the idea of a loan of money at a usurious rate of interest. "Where the promise to pay a sum above legal interest depends upon a contingency, and not upon the happening of a certain event, the loan is not usurious." Spain v. Hamilton, 1 Wall. 604; Tyler, Usury, p. 98; Lloyd v. Scott, 4 Pet. 205. This principle is applied to contracts of insurance, of bottomry, to post-obits, and annuties. Tyler, Usury, p. 175 *et seq.*; Delano v. Wild, 6 Allen, 1; Bowker v. Association, 7 Allen, 100. In Parker v. Association, 46 Ga. 166, the court said: "Even on the idea that he was borrowing the money, and was merely selling his interest in the dividend, it was wholly a matter of contingency whether he paid seven per cent., or more or less than that for the money. This fact, this uncertainty or contingency, introduces into the transaction an element wholly foreign to an agreement to pay so much for the use of money." The association does not know what it will get back, or what the borrower will eventually pay, as that depends entirely on how long it will take to reach the point of final winding up. *Id.*; Association v. Richards, 21 Ga. 591; Shannon v. Dunn, 43 N. H. 194; Burns v. Association, 2 Mackey, 7. There are expenses and losses incident to the business of these associations which must be considered in estimating the value of the shares of the members before maturity. Pattison v. Association, 63 Ga. 373. The testimony in this case shows that if the appellant had kept his contract, the interest he would have paid on the moneys he received from the association would have been in one of the transactions 7 3-16 per cent. per annum and in the other 4 1-8 per cent. It is contended by the counsel for appellant that the statutory rule for computing interest, where partial payments are made, is applicable to these transactions, and that the payments of monthly dues should bear interest, or cause interest to cease upon the principal, from the time they are made, to the extent that they reduce the principal. But the member nowhere reserves the right to charge the association interest on his stock payments. He has no claim as a member to such interest, and it cannot be assumed that by incurring the additional obligations toward the association involved in the grant of an advancement his previous rights in respect to it have become enlarged. He continues liable on his original undertaking. A borrower's claim to have these items taken into account, and to be given credit therefor at any intermediate stage, "has no foundation in law or equity." "It must be remembered that he is, in the first place, a member, and only in the second place a borrower. In the former capacity he has no right to an account of profits except upon the termination of the scheme." "As for interest upon his several stock payments, his contract with the building association, upon acceding to it, never contemplated such a thing. No such stipulation, expressed or implied, ever entered into the bargain. All he was entitled to, all he reserved to himself the right to claim, was a share of the profits of the building association's dealings with the whole fund of subscriptions." End. Bldg. Ass'n. 456. Where the contract, however, is for a mere loan of money upon which a rate of interest greater than that allowed by law is exacted, no device, shift, or cloak, whatever its form, or how specious soever it may be, can protect it from the taint of usury.

DESCENT AND DISTRIBUTION—CIVIL DEATH—IMPRISONMENT FOR LIFE.—The Supreme Court of Texas in Davis v. Laning, 19 S. W. Rep. 846, decided that under the laws of that State the estate of one sentenced to imprisonment for life does not descend or vest as in case of death. Marr, J., says:

The question presented for our determination is one of first impression in this State, if it can be deemed a question at all, in view of the bill of rights and our statutory provisions which relate to descent and distribution, administrators and wills, and the probate thereof, etc. Attainders, outlawry, deprivation of property except by due process of law, and the corruption of blood or forfeiture of estate, as a result of conviction of crime, are expressly prohibited by the organic law. Const. art. 1, §§ 16, 19-21. Section 21 declares that "no conviction shall work a corruption of blood or forfeiture of estate, and the estate of those who destroy their own lives shall descend or vest as in case of natural death." This provision is invoked by the plaintiffs in error, but it aids their case no further than a declaration that a convict may either inherit himself or transmit inheritance. It does not attempt to determine at what time the descent of his estate shall be cast, but excludes this idea by the express regulation concerning the estates of suicides. In any event, it most certainly does not declare that the estates of convicted felons shall, upon conviction, "descend or vest as in case of natural death." In short, we find nothing in the constitution to support the position of the plaintiffs, but much that might warrant an opposite conclusion. It is not necessary, however, for us to determine whether, under the provisions of the constitution before cited, it would be within the power of the legislature to establish a rule of descent as contended for by the plaintiffs, in cases like the present, for the plain reason that, so far as we are aware the legislature has not yet enacted any such law. The statutes before mentioned are too numerous to be quoted, but an examination of the provisions will, as we think, inevitably lead to the conviction that, whenever these statutory enactments upon the subjects aforesaid speak of death, they mean the natural death of the person whose estate or testament is involved. Analogous statutes are so construed in similar cases by the court of appeals of New York and the Supreme Court of Ohio. As our statutes regulate the time when the descent is cast, viz., when the ancestor is in fact dead, we are not, therefore, relegated to the common law for a rule of decision, although, under that law, even an attainted convict was not divested of the title to his lands until after office found, but could dispose of them by will, subject to a forfeiture at the instance of the crown, etc. Avery v. Everett, 110 N. Y. 317, 18 N. E. Rep. 148. In the case just cited it was held that, although a statute of that State declared that "life convicts should thereafter be deemed civilly dead," still, in case of a devise of land to such a convict with directions that if he should die without issue the property shall not vest in another, the land "does not so vest upon his civil death." The decision was not rested upon the intention of the testator, but upon the broader ground that the conviction had not divested the convict of his title to the land. We have no such statute as the one above quoted, and for stronger reasons, therefore, would the principle just announced apply to the case in hand. The Supreme Court of Ohio held that "a man sentenced to imprisonment for life in the penitentiary, in punishment for crime, is not civilly dead, and letters of administration cannot be granted upon his estate." Frazer v. Fulcher, 17 Ohio, 260. The learned judge who delivered the opinion observed that "we know that in England there are cases in which a man, although in full life, is said to be civilly dead, but I have not learned until this case was brought before us that there was but one kind of death known to our laws." This, perhaps, about expresses the state of our own laws upon the subject. It has been decided that convicted felons may be sued and may dispose of their property by will or deed, etc., and it would seem that, under the terms of our own statutes, there exists no valid objection to a convict devising his lands, if otherwise possessed of the statutory qualifications essential to testamentary capacity. Avery v. Everett, *supra*; Rankin's Heirs v. Rankin's Ex'rs, 6 T. B. Mon. 531; Rev. Stat., art. 4857. See, also, art. 3222. If he can be sued, and his property seized by his creditors after conviction, as has been held; if he can dispose of it by will to vest as he shall direct after his death—then, clearly, he is neither dead in fact nor in law, and *a priori* there can be no descent of his estate to "his heirs at law," under such circumstance. We do not deem it important to pursue the inquiry to any greater extent. We think that we have said sufficient to indicate our views of the point at issue. The subject, however, in many of its phases, is exhaustively discussed in the case of Avery v. Everett, *supra*, and in a learned note to that decision, as reported in volume 6 of the American State reports (page 379). See, also, 2 Lawson, Rights, Rem. & Pr. § 899. We have no statute like that in England, providing for the appointment of a trustee or guardian of the estate of a living convict. That is a matter for the determination of the legislative department. We conclude that the conviction and sentence of C. C. Davis did not effect a devolution of the title to his land upon the plaintiffs in this case as his heirs at law, and that the maxim, *nemoest hæres viventis*, applies. The judgment should be affirmed.

CONSTITUTIONAL LAW—MUNICIPAL TAXATION—RATE.—The leading article in this issue, written by Alex. Martin, Esq., of the law department, University of Missouri, discusses and criticises in a vigorous and interesting manner the recent decision of State v. The Town of Columbia, by the Supreme Court of Missouri. In that case it was held that under section 11, article X of the constitution, providing for a maximum rate of taxation, the town of Columbia, having a population of more than 1,000 and less than 10,000, cannot levy a tax in excess of 50 cents on the $100 of valuation, and that this rate cannot be extended even to meet a debt contracted according to the provisions of the 12th section, article X, notwithstanding the debt is within the limit of indebtedness prescribed in said section. Black, J., says:

Section 1947. Rev. Stat. 1889 provides that towns and villages may contract debts in excess of the annual income and revenue for any year, for any purpose authorized by the charter of such town or any

general law, upon the assent of two-thirds of the legal voters voting at an election held for that purpose; provided, such indebtedness, so to be contracted shall not, with the existing indebtedness, exceed in the aggregate five per centum of the value of the taxable property therein.

Under this statute Columbia would have a right to create an indebtedness to the aggregate amount of five per cent. of the taxable property therein. It is conceded that the indebtedness, including the proposed bonds, does not quite reach the limit. The town, therefore, has the power to create the debt in question, and to levy and collect a tax to pay the same over and above the 50 cents on the $100 valuation, unless restrained from so doing by the constitution; and this brings us to the vital question in this case. The restrictions, if any they are, are to be found in the following sections, being 11 and 12 of Art. 10 of the constitution of laws:

"Sec. 11. Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefore shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes, the annual rate on property in counties having six million dollars or less shall not, in the aggregate, exceed fifty cents on the hundred dollars' valuation; in counties having six million dollars and under ten million dollars said rate shall not exceed forty cents on the hundred dollars' valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars' valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars' valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not in the aggregate exceed one hundred cents on the hundred dollars' valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars' valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars' valuation; in towns having one thousand inhabitants or less, said rate shall not exceed twenty-five cents on the hundred dollars' valuation. For school purposes in districts the annual rate on property shall not exceed forty cents on the hundred dollars' valuation: Provided, the aforesaid annual rate for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars' valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars' valuation, on the condition that a majority of the voterswho are tax payers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein according to the last assessment for State and county purposes, and the rate allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.

Sec. 12. No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for the State and county purposes previous to the incurring of such indebtedness: Provided, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a court house or jail. And provided, further, that any county, city, town, township, school district, or other political corporation or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same."

It is to be observed in the first place that these sections limit taxation in two ways. Section eleven fixes a maximum annual rate, while section twelve places a limit to the amount of indebtedness that may be incurred. By section eleven the maximum annual rate is graded according to the valuation of taxable property for county and for school purposes; but for city and town purposes it is graded according to population. This section asserts in positive terms that in cities and towns having less than ten thousand and more than one thousand inhabitants the annual rate of taxation shall not exceed 50 cents on the $100, and Columbia belongs to this class. The same section makes some exceptions. The first relates to a general school tax, and has nothing to do with the present case. The second exception provides that the rates before specified may be increased by a two-thirds vote for the purpose of erecting public buildings in counties, cities and school districts. Towns, it will be seen, are not mentioned in this exception. This exception can have no application to the case in hand for the further reason that the proposed debt is not one created for the purpose of erecting public buildings. None of the exceptions in this section aid the defendants in this case, so that the maximum rate still stands at 50 cents. But this section is still more emphatic. The last clause says, said "restrictions as rates shall apply to all taxes of every kind and description whether general or special." The tax which the trustees propose to levy to pay the interest on these bonds and to create a sinking fund is a special tax within the meaning of the clause of section eleven just quoted. It is therefore perfectly clear that the annual tax to pay current expenses and to pay the interest on these bonds and to create a sinking fund cannot exceed in the aggregate, 50 cents on the $100 valuation. Now the ordinances in this place contemplate and indeed provide that this debt, evidenced by the bonds, shall be paid by a tax additional to the levy of 50 cents on the $100 valuation. To the 50 cent tax it is proposed to add an interest tax and a sinking fund

tax to pay the bonds, amounting to an annual levy of at least 37 1-2 cents on the $100. As this additional tax is in excess of the constitutional limit it will be illegal and its collection may be enjoined. Books v. Earle, 37 Mo. 246; Arnold v. Hawkins, 95 Mo. 569; Black v. McGonigle, 103 Mo. 192.

Now is there anything in section 12 which modifies the result just stated.

That section declares: "No county, city or town shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year income and revenue provided for such year without the assent of two-thirds of the voters" etc. The income and revenue provided for a particular year depends, of course, upon the rate of the levy for that year, and this section does not undertake to give a county, city or town the power to levy a tax in excess of the maximum rates, so far as they are specified in section eleven. When a county, city or town has levied the highest rate allowed by section 11, it can levy no further or additional tax, except that in counties, cities and school districts the rates may be increased with the prescribed vote for the purpose of erecting public buildings, as to which no maximum annual rate is fixed by section 11. Bernard v. Knox Co. 105 Mo. 382. But even in such cases the aggregate amount of indebtedness must not exceed five per centum of the value of the taxable property. To this there is the exception in favor of a county as to debts incurred for the erection of a court house or jail. These exceptions as to annual rates do not apply to towns, unless we construe the words "for the purposes of erecting public buildings in counties, cities and school districts" as including towns, and if we do give them that construction, still the words "public buildings" do not include water works.

These two sections relate to the same subject, are consistent with each other, and they must be construed together. They deny to towns like Columbia the power to levy a tax exceeding 50 cents on the one hundred dollars' valuation for any such purpose as that contemplated by the ordinances in question. As before stated the tax to pay current expenses and to pay this proposed water works and electric light plant debt must not, in the aggregate exceed 50 cents on the one hundred dollars' valuation. The town has no right or power to increase its tax levy beyond that amount for the purpose of building water works or lighting the streets and highways. Perhaps the town could pay these bonds out of the 50 cent tax and the revenues derived from the water works, but that fact does not, nor is it claimed that it can, aid the defendants; for the ordinances in question provide for a tax to pay the bonds over and above the 50 cent annual tax. The town has no power to levy or collect such a tax.

Although the entire indebtedness of the town, including these proposed bonds, does not reach five per cent. of the value of the taxable property, still it is proposed to levy a tax exceeding 50 cents on the one hundred dollars. One constitutional limitation is just as binding as the other. The town will not be allowed to violate either. Whether the bonds, if issued and sold could or would be payable out of the 50 cent tax, and therefore valid, is a question not discussed in the briefs nor considered by this court. The bonds should not be issued under the ordinances in question, because the ordinances provide for their payment by a tax which the constitution says the town cannot levy.

MUNICIPAL POWER OF TAXATION.

The subject of this paper, being a review of a recent decision of the Supreme Court of Missouri,[1] involves a construction of our organic law as established by the people in convention assembled. It relates to the most important power conferred upon governments, either State or municipal—the power of taxation. The supreme court has imposed a construction upon the 12th section of article X of the Missouri constitution which manifestly leaves it without any practical or beneficial effect whatever. This is substantially confessed in the opinion of the court, which holds that a debt within the constitutional limit of five per cent., and contracted by a two-thirds vote, according to the form prescribed in that section, is nevertheless void. This conclusion is at war with the construction placed upon the section by the legislature, which passed the enabling act of 1889 for the purpose of carrying into effect its beneficial provisions. Neither is it in accord with the construction heretofore very generally placed upon it by the bar of the State, under whose advice many towns and cities have incurred debts for improvements within the limits prescribed by that section. If the construction of the supreme court is correct, then it will become its duty to enforce it in a large class of cases in which irremediable hardship must attend its action. If its construction is erroneous, then the court itself, upon the first opportunity it has, should reverse itself—something which it has found necessary and proper to do on more than one occasion in its past history. To err in the construction of a section of the constitution, which has been acted upon by one branch of the government, and which action has been followed by the people for several years, is a very serious matter, which it is possible the learned court did not fully appreciate at the time it rendered its opinion. In the interest of justice, which does not depend upon the opinions of fallible courts, a few considerations bearing upon the correctness of this opinion are herein confidently "submitted to a candid world:"

1. Sections 11 and 12 of article X are set out in full in the opinion of the court. The action of the town of Columbia is also sufficiently stated in it to enable the reader to understand the merits of the opinion. For convenience, its action may be rehearsed in an abridged form. In respect to its taxing power, the town of Columbia possesses the right of towns having a population ranging from 1,000 to 10,000. In towns of her size the maximum limit of taxation for town purposes is fixed at 50 cents on the $100 of valuation, and includes all property subject to taxation. According to the taxable wealth of the town, this tax results in an annual revenue of about $6,000, which for many years past has been consumed in defraying the current expenses of the town.

[1] See preceding page of this issue for opinion of the court in State v. Town of Columbia, together with full text of the provisions of the constitution herein commented upon.

The town is without any improvements in the nature of water-works or electric lights. Accordingly, in pursuance of the express provisions of the enabling act of 1889, which has been incorporated into the revision of 1889 as sections 1947 to 1951 inclusive, which provisions, so far as they relate to the constitution, have been literally copied from the 12th section of article X of the constitution, as conceded by the court in its opinion. The town, after a vote of two-thirds of the voters in that behalf, ordered, by ordinance, the creation of a debt of $45,000 in the shape of water and light bonds, for the purpose of paying for the erection of a water and light plant. This indebtedness was strictly within the limit of 5 per cent. on the taxable wealth of the town, as prescribed by said section 12. In further obedience to the express command of said section, and of the enabling act referred to, the town at the same time made provision for the collection of an annual tax sufficient to pay interest on the bonds and create a sinking fund for liquidation of the principal in twenty years. The ordinance provided that 1-20th of the debt and the annual interest should be collected every year by an annual tax. This would require for the first five years an annual tax of 37½ cents on the $100 of valuation, which, according to the ordinance, was not to be included in the annual tax of 50 cents on the $100, which latter tax was required for current expenses. After five years this extra tax would decrease gradually as the debt would be decreased by payments from the sinking fund. Just as the town was about to put its bonds on the market, it was enjoined from doing so by suit in the name of the State at the instance of the prosecuting attorney. This action of the circuit court was affirmed by the supreme court in its present opinion, on the sole ground that the extra tax provided for by the ordinance was unconstitutional and void, as being in violation of section 11. The tax being void, the court declares the debt is also void, although within the constitutional limit of section 12, and provided for by a sufficient annual tax as prescribed in said section. This, it is believed, is a fair statement of the material facts bearing on the point decided.

2. The ground upon which the court rests its conclusion is, according to its opinion, contained in the following language of section 11, which relates to the maximum rate of taxation prescribed for towns the size of Columbia: "Said rate shall not exceed fifty cents on the one hundred dollars' valuation. * * * Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness, now existing, or bonds which may be issued in renewal of such indebtedness."

Under section 11, construed as if standing alone, there would seem to be, as to towns, only one exception to the maximum limit imposed by the section—an exception in favor of debts created anterior to the constitution. This is properly noticed by the court. In respect to such debts the restrictions of section 11 have no application whatever. The convention evidently did not intend to obstruct the payment of existing indebtedness by any provisions of the constitution. Such obstruction would probably have been declared illegal by the federal courts. In respect to this maximum tax, the court construes and applies it to towns as absolutely and unqualifiedly as if there was no 12th section applying also to an annual tax to be levied by towns. It may be conceded that, viewed standing alone and disconnected with other provisions of the constitution applying to the same subject-matter, the 11th section, outside of anterior indebtedness, imposes a maximum limit on both general and special taxation—all general and all special taxation.

3. But, unfortunately for this conclusion, there is a 12th section, subsequent to the 11th, which allows the legislature to permit towns, upon a two-thirds vote, to incur debts in excess of the annual income and revenue, but within a maximum limit of 5 per cent. of their wealth. And what is more to the point, there is an express clause in that section which provides a particular mode of paying it by an annual tax. It declares that any town "incurring any indebtedness requiring the assent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same."

Let us pause for a moment to consider this express clause, which seems on its face to leave no discretion in the town to provide a sufficient annual tax whenever it incurs a debt approved by a two-thirds vote of its inhabitants. The convention evidently contemplated that debts in excess of the ordinary income had to be provided for by an adequate and sufficient tax. Only in this manner could the public credit be maintained. The clause directs that the town shall provide for the collection of an annual tax. This means a tax generally on property according to its valuation. This is the ordinary signification of the term as used in our constitution and laws. The town is not at liberty to incur the debt provided for in the 12th section, except upon the faith of an annual tax on its taxable wealth. No other security will legalize the debt. The extent of this annual tax is also fixed by the 12th section. *Id centum est, quod centum reddi potest.* The maximum limit of this annual tax must accord with the debt incurred, in being sufficient to pay it in a certain time and way. It must be in amount sufficient to accomplish two things, viz.: "To pay the interest on such indebtedness as it falls due;" also, "to constitute a sinking fund for payment of the principal thereof" in twenty years. If 75 cents on the hundred dollars will be required to do this, then the town must provide for the col-

lection of such a tax, no other rate being sufficient under the law. This is the plain language and import of section 12. No other meaning could be imputed to it when construed by itself.

4. It is somewhat surprising that the court, in its opinion, fails to construe or notice this express clause relating to "an annual tax sufficient" to meet a debt incurred by vote of the inhabitants. The clause expressly declares that the town shall provide a sufficient tax. Columbia provided for the collection of nothing more, as submitted by the court, yet the court holds in effect that the town shall not do what the 12th section says the town may do, when authorized by the legislature. As the holding of the court is at war with the natural and obvious meaning of the clause considered by itself, it would seem that a careful consideration of it would have been in order. No consideration of it, careful or otherwise, is apparent in the opinion of the court. The court says that the two sections limit taxation in two ways—section 11 by fixing a maximum annual rate, section 12 by placing a maximum limit to indebtedness incurred. But the court says nothing whatever about the clause in the 12th section, which purports to lift the annual tax to a maximum sufficient to pay the maximum of indebtedness, when incurred by a two-thirds vote. Its construction of the 12th section is the same as if there was no clause about providing for the collection of a sufficient tax; or as if there was an interpolation in that clause, so as to make it read as follows: "That any town incurring any indebtedness requiring the assent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax [not in excess of the annual rate fixed in section 11] sufficient to pay" the interest as it accrues, and to liquidate the debt in twenty years. If the convention had intended that the 12th section should be thus restricted, it is natural to believe that they would have used some restricting language to that effect in the section; something to repel the irresistible inference of a higher tax, to comply with the express requirement of sufficiency so plainly expressed.

5. This brings us to the precise point of inconsistency between the two sections, when they are both construed without reference to each other. But before stating it or considering the rule of construction which disposes of it, it is proper to remind the reader that in construing these two sections they must be regarded only in the light of limitations on the power of taxation, as conferred by the legislature, and not as actually conferring upon municipal bodies the right of taxation. Section 1, article X of constitution. State *ex rel* v. Van Enery, 75 Mo. 536. The legislature has authorized the town of Columbia "to levy and collect taxes upon property." Rev. Stat. 1889, § 1672. It has also authorized it to borrow money and incur debts upon a two-thirds vote for any town purpose. Rev. Stat. 1889, §§ 1947 to 1951, inclusive. The point in controversy is whether the town has, in following the acts of the legislature, exceeded the constitutional restraints on the legislature as well as on towns, contained in sections 11 and 12.

Now, then, as to the conflict between the two sections when viewed apart from each other. In the 11th section the maximum annual rate of taxation for towns like Columbia is 50 cents on the $100 of valuation. In the 12th section the maximum annual tax to pay a debt incurred by a two-thirds vote, and within the 5 per cent. limit, is not the 50 cent tax of the 11th section, but a tax sufficient to pay the interest and debt inside of twenty years. Whenever the sufficient tax of the 12th section is in excess of the annual tax of the 11th section, as it will invariably be when incurred by the vote provided for, there is a conflict between the two sections which cannot be reconciled by any construction which interprets them without reference to each other. What is to be done when an inconsistency thus arises between two sections or clauses of the same instrument or constitution? It will not help us out in the least to say that one section is just as binding as the other; and then declare, as the court has done in effect, that the one shall prevail and the other go to the wall. It is quite as reasonable to say that the other is just as binding as the one, and that the other shall prevail and the one go to the wall. There is respectable authority for the latter conclusion in this case, inasmuch as the other section is subsequent in time and location, and presumably the latest expression of intent by the authors of the constitution. Quick v. Whitewater Township, 7 Ind. 570. But we are not driven to any such battledoor and shuttlecock game as this to maintain the validity of the disputed tax.

There is a fundamental rule governing the construction of inconsistent clauses in contracts, statutes and constitutions. Judge Cooley, in his work on Constitutional Limitations, announces it in positive terms: "The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory." Cooley on Const. Lim. 71.

Again, the same author says, in speaking of constitutions: "One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require it if stood alone; but one part is not to be allowed to defeat another if, by any reasonable construction, the two can be made to stand together." Cooley Const. Lim. 71. This is elementary.

Now, let the rule be applied to the two sections which, according to the natural construction of them as standing alone, undoubtedly present an apparent conflict or inconsistency. Outside of indebtedness existing at the date of the constitution, section 11 declares that the annual rate of

taxation in towns of the size of Columbia shall not exceed 50 cents on the $100 of valuation, and that this maximum rate applies to all kinds of taxation, whether general or special; that is, to all kinds of special taxation as well as all kinds of general taxation. This would unquestionably apply to the tax of Columbia, incurred by a two-thirds vote, if the convention had not in section 12 made an express provision for the tax required to be provided for in that section. Section 12 declares that when a debt is incurred in a certain way—by vote of the people—and within the 5 per cent. limit indicated in said section, the town shall provide for an annual tax sufficient to pay it off in twenty years. If any effect is to be given to this section—any practical or beneficial effect—the sufficient tax will almost always have to exceed the annual rate mentioned in section 11. To give the 12th section a rational and beneficial effect, the town must provide for a tax in excess of the ordinary rate of the 11th section, whenever it is necessary to pay off a debt contracted by a two-thirds vote, within the 5 per cent. limit. In all other cases it cannot exceed the ordinary maximum. The 11th section is not annulled. In remains in full force as to all general and special taxes, except the express one provided for in section 12. Thus we see that the two sections, apparently inconsistent when construed by themselves, work harmoniously when construed with reference to each other and the subject-matter to which they both relate. The 12th section is given a rational and beneficial effect in thus being construed as modifying section 11 as to one kind of particular or special tax, leaving it in force as to all other kinds of general and special taxes. This is true harmony, not the sort of harmony which existed between the lion and the lamb, when the lion took his rest with the lamb inside of him. Neither should the 11th section be permitted to rest as left by the court, with the 12th section inside of it, as if never enacted by the convention.

6. It must be admitted, upon a careful examination of the construction adopted by the court, that it signally fails to give any practical or beneficial effect to section 12. That its construction renders the 12th section idle and nugatory is easily demonstrated, if it is not substantially admitted in the opinion of the court. While the 12th section purports to permit the incurring of a debt within the 5 per cent. limit, upon approval of a two-thirds vote, the court declares that the debt is void if the annual tax necessary to pay it is in excess of 50 cents on the $100 of valuation. In other words, the section invites the town to contract any debt it pleases for improvements within the 5 per cent. limit, but which debt is nevertheless void. The expensive machinery of taking a vote of the people, strictly within the 5 per cent. limit, is a useless contrivance when the tax sufficient to pay it exceeds the ordinary rate. In respect to most towns and cities in the State, this will invariably be the case when an improvement is of such a cost as to justify a vote of the people. Could anything be more idle and nugatory than this? You can vote your 5 per cent. debt, but it is absolutely void! It is only when the towns have sought to impose a higher tax than the one furnished in the ordinary rate that they have invoked the supposed benefits of the 12th section.

Again: If the towns cannot, when they incur a five per cent. indebtedness, provide a tax in excess of the ordinary rate, why should they take the vote at all? They can utilize the ordinary rate without a vote. It is always at their command for town purposes without vote of the people. The convention must have known this. All efforts to harmonize the 12th section with the construction adopted by the court have proved transparent failures. None of them have ever given, or can give, to that section any practical or substantial effect; and it might just as well have been left out of the constitution, according to the construction of the court. It is suggested in the opinion that "perhaps the town could pay the bonds out of the 50 cent tax and the revenues derived from the water-works." The bonds have to be sold and the debt contracted in order to raise funds with which to build the works. The debt cannot be incurred except on the faith of the security after a two-thirds vote. The security which the 12th section mentions is an annual tax, not the uncertain revenues of any enterprise. The bonds could not be sold on the faith of the security suggested by the court. This is business, not law. Besides, the validity of the bonds, if sold, might be well questioned, since there seems no authority in the 12th section to contract the five per cent. debt without providing for its payment by an annual tax. The vote for the debt and the provision to pay it must go together.

Undoubtedly the condition of affairs in this State, anterior to the constitution, justified all the restrictions contained in that instrument. They have been properly designated of late years as a straight jacket on the body-politic. Nothing has happened in the State since its adoption to justify the supreme court in putting on it a straighter jacket than the one thus furnished by the convention of 1875; yet this is precisely what the court has done in its construction of the 12th section.

In this connection it may be mentioned that the opinion whose soundness has been questioned was not rendered upon hearing or trial before a full bench, and that none of the judges of Division 2 participated in the hearing or decision. Under the recent amendment of the constitution it is not always possible to obtain a hearing before the full bench, even on grave constitutional questions. If there is anything in this decision except the "dull thud" of indefensible error, it will have to be made to appear in some future expression of the court in the serious litigation which it leads to.

ALEX. MARTIN.

Columbia, Mo.

TORTS—UNAUTHORIZED DISPLAY OF FIREWORKS—INJURY TO VOLUNTARY SPECTATOR.

SCANLON V. WEDGER.

Supreme Judicial Court of Massachusetts.

Although a display of fire works on a highway be unauthorized, persons present thereat as voluntary spectators cannot recover for injuries from the fireworks, not caused by negligence.

ALLEN, J.: The several plaintiffs were injured by the explosion of a bomb or shell during a display of fireworks in Broadway square, which was a public highway in Chelsea. This display was made by the defendant Wedger, who acted under a license from the mayor and aldermen of Chelsea for a display of fireworks in Broadway square on that evening, under Pub. St. ch. 102, § 55. A verdict was returned for the defendant, and the jury made a special finding that the defendant, in firing the bomb, exercised reasonable care. The case comes to us on a report, which states that if, on the facts contained therein, and on said finding, the plaintiffs are entitled to recover, the case is to be remitted to the superior court for assessment of damages; otherwise judgments are to be entered for the defendant. It is therefore to be considered whether it appears affirmatively that the plaintiffs were entitled to recover.

The plaintiffs apparently were present at the display of fireworks as voluntary spectators, and were of ordinary intelligence. No fact is stated in the report to show the contrary, nor has any suggestion to that effect been made in the argument. The plaintiffs have not rested their claims at all upon the ground that they were merely travelers upon the highway, or that they were unaware of the nature and risk of the display. The report says: "A considerable number of persons were attracted to said square by said meeting, and said bombs and other fireworks which were being exploded there. A portion of the center of the square about 40 by 60 feet was roped off by the police of said Chelsea, and said bombs or shells were fired off within the space so inclosed, and no spectators were allowed to be within said inclosure. * * * The plaintiffs were lawfully in said highway at the time of the explosion of said mortar, and near said ropes, and were in the exercise of due care." The bombs or shells are described in the report, and they were to be thrown from mortars into the air, it being intended that they should explode in the air, and display colored lights. They were apparently a common form of fireworks, such as has long been in use. The ground on which the plaintiffs place their several cases is that Pub. St. ch. 102, § 55, did not authorize the mayor and aldermen of Chelsea to license the firing of anything but rockets, crackers, squibs, or serpents, and that, therefore, the act of the defendant in firing bombs or shells was unauthorized and unlawful. It is not contended that it was at the time supposed either by the defendant or by anybody else that the license was insufficient to warrant the display which was actually made. The licensee was the chairman of a committee which had a political meeting in charge, and the defendant acted at the request of the committee, and was directed by them as to when and where to fire off the fireworks. Under this state of things, it must be considered that the plaintiffs were content to abide the chance of personal injury not caused by negligence, and that it is immaterial whether there was or was not a valid license for the display. If an ordinary traveler upon a highway had been injured, different reasons would be applicable. Vosburg v. Moak, 1 Cush. 453; Jenne v. Sutton, 43 N. J. Law, 257; Conradt v. Clauve, 93 Ind. 476. But a voluntary spectator, who is present merely for the purpose of witnessing the display, must be held to consent to it, and he suffers no legal wrong if accidentally injured without negligence on the part of any one, although the show was unauthorized. He takes the risk. See Poll. Torts, 138-144. In the opinion of a majority of the court, the entry must be, judgments for the defendant.

NOTE.—On the subject of the use of highways, which is a part of the question in the principal case, it is true that travelers are not bound to keep in motion every instant they are on the road. They have a right to stop temporarily for business or pleasure, provided they do not unreasonably interfere with the rights of others who wish to use the road. 3 Lawson's Rights, Remedies and Practice, 2050; Hussey v. Ryan, 54 Md. 426, 54 Am. Rep. 772. It is not negligence for a pedestrian to use the carriage path of the highway (Coombs v. Purrington, 42 Me. 332; Raymond v. Lowell, 6 Cush. 530, 53 Am. Dec. 57), but a person will not be permitted to recover damages for an injury received from a defect in the highway while using it for a purpose prohibited by law (2 Thompson's Negligence 1200), nor for other uses than those which pertain to public travel, though not prohibited, as leaning or sitting upon railings erected as barriers. 2 Thompson on Negligence, *supra*. A traveler does not forfeit his rights by stopping momentarily to pick berries by the wayside (Britton v. Cummington, 107 Mass. 347), or to fill up a small hole in the road which might otherwise be a means of injury to other travelers (Babson v. Rockport, 101 Mass. 93), or for no other purpose than to gratify his curiosity; as to watch the progress of a horse trade (Bigelow v. Reed, 51 Me. 325), or to watch workmen upon a hole in a gas main, from which operation the traveler receives an injury to his eye from a particle of the iron chipped off (Cleveland v. Spier, 16 C. B. N. S. 399), or to sit down on a step to rest. Caples v. Orth, 61 Wis. 531. Children stopping on the street to watch others at play, do not cease to be "travelers." Bliss v. Inhabitants, 145 Mass. 9. A child, however, using a highway as a playground and not for travel, cannot recover for an injury received during such use although the injury resulted from a defect in the road. Stinson v. Gardiner, 42 Me. 248, 66 Am. Dec. 281. It has been held that the use of a sidewalk by a child to roll its hoop upon, is not an improper use. Reefe v. Chicago, 114 Ill. 222.

Morton and Knowlton, JJ., dissent from the conclusion

of the court in the principal case. They proceed upon the supposition that the license granted to defendants was void and therefore the highway was being used for a purpose that was dangerous, unlawful, wrongful and unjustifiable as against anybody lawfully in the highway, and in the exercise of due care. It is not claimed that the plaintiffs participated or aided in the display, and there is no evidence that they were guilty of contributory negligence. In reference to the conclusion of the court that the plaintiffs assumed the risk, Justice Morton says:

"Merely that a political meeting was being held in the square, to which a considerable number of persons had been attracted, and that bombs and other fireworks were being discharged there, and that at the time of the explosion the plaintiffs were near the rope that inclosed the space that had been roped off for discharging the fireworks, but were lawfully there, and in the exercise of due care. There is no evidence that they know or had any reason to suppose that such mortars were liable to explode and injure bystanders, or that they were familiar with their construction, or the manner in which they were fired, or were aware that the bombs were charged with an explosive more powerful than ordinary gunpowder. There is nothing to show that they had any knowledge or suspicion that they were incurring any risk by being where they were. An inference or a conclusion that they were not unaware of the risk rests, it seems to me, entirely on assumption. The most that can be said of them is that they were voluntary spectators of the display. But before they can be held to have assumed the risk it must appear that they knew all the facts material to the risk, and appreciated and understood it. Fitzgerald v. Railroad Co. (Mass.), 29 N. E. Rep. 464; Anderson v. Clark, *Id.* 589; Mahoney v. Dore (Mass.), 30 *Id.* 366. It is carrying the doctrine of assumption of the risk further than I think it has ever been carried to say that one who, being lawfully on the highway, and in the exercise of due care, observes as a spectator an unlawful and dangerous exhibition in it, assumes the risk. The exhibitor is bound at his peril to see that he has a valid license. If he selects the highway for an unlawful and dangerous display designed or calculated to attract the public, he and not the spectators assumes the risk of injury. It is of no consequence that the defendant exercised reasonable care in firing the bomb. It is a contradiction of terms to say of one engaged in an unlawful, dangerous, wrongful and unjustifiable business that he used due care in it. Due care is predicated of something which a person may lawfully do, but which by his negligent manner of doing it may become injurious to others, not of something which he has no right whatever to do. Further, the question of assumption of the risk is ordinarily one of fact for the jury. Cases, *supra*. The plaintiffs are not bound to show that they did not assume the risk. Unless it appears that they did, they are entitled to recover. This court cannot say as matter of law upon the facts stated that the plaintiffs assumed the risk. Nothing is disclosed as to the circumstances under which the plaintiffs were present. For aught that appears they might have been travelers stopping for a moment on their way through the square, or detained by the crowd. It is difficult to see what the plaintiffs' supposition (if they did suppose it) that the exhibition was a lawful one had to do with their assumption of the risk, and still more difficult to see it if the exhibition was, as it proved to be, unlawful. I understand the question submitted to this court by the report to be whether, upon the facts therein stated, and upon the finding of the jury as to reasonable care on the part of Wedger, the plaintiffs were entitled to recover. I think they were, and that no other conclusion is warranted on principle or by authority. Vosburg v. Moak, 1 Cush. 453; Cole v. Fisher, 11 Mass. 137; Moody v. Ward, 13 *Id.* 299; Congreve v. Smith, 18 N. Y. 79; Congreve v. Morgan, *Id.* 84; Cohen v. Mayor, etc., 113 *Id.* 532; Jenne v. Sutton, 43 N. J. Law, 257; Fletcher v. Rylands, L. R., 1 Exch. 265, 279, *et seq.*"

CORRESPONDENCE.

GARNISHMENT STATUTES.

To the Editor of the Central Law Journal:

By a recent statute in Michigan in garnishee proceedings it is provided "If any person garnisheed shall have in his possession any of the property aforesaid of the principal defendant, which he holds by a conveyance or title that is void as to creditors of the defendant, or if any person garnisheed shall have received and disposed of any of the property aforesaid of the principal defendant, which is held by a conveyance of title that is void as to creditors of the defendant, he may be adjudged liable as garnishee on account of such property and for the value thereof, although the principal defendant could have maintained an action therefor against him."

Would you kindly advise me, if you can do so without inconvenience, whether any other States have a similar statute, and if so, what States, and whether the courts of any such States have construed the provisions, and confer a great favor upon your subscriber. S.

BOOK REVIEWS.

TRAVIS ON SALES AND COLLATERAL SUBJECTS.

To judge from the introduction written by the author of this work, it would seem that he had undertaken to revise the opinions of courts and point out the fallacies and errors which have crept into the law from time to time. And though such an object is entirely praiseworthy, the language of the author, as used in the preface, has subjected him to a certain amount of criticism.

Notwithstanding this, we have examined the text of the work and find it of good substantial value. Those who complain of the modern text book as being a mere digest, will find here something in the way of philosophic study and scholarly research.

The reader will frequently take issue with the author in his views of alleged errors committed by courts. But the value of the work as an argument is none the less to be admitted. The author has, with wisdom, called his work a commentary not only on the law of sales but of collateral subjects. The fact is that it is as much a work on collateral subjects as it is on the law of sales. For instance, a good portion of one volume is devoted to the subject of railroads which incidentally discusses some of the questions regarding the law of sales. The work is very well written and the style of the author is pleasing. The citation of authorities is very voluminous and exhaustive.

It discusses the questions as to what is a sale as distinct from a gift or a bailment, sales with infants and with married women, corporation sales and purchases, partner's sale and the subject of agency in sales. There are chapters on railroads particularly with reference to station agents fraudulently signing

freight receipts for goods not received and railway contracts for through carriage of goods. It also has chapters on the principal questions arising on a sale under the statute of frauds.

The work is in two large volumes with a very complete index and beautifully printed and bound, the publishers being Little, Brown & Co., Boston.

HARRIS ON THE LAW OF DAMAGES BY CORPORATIONS.

There is some reason for the view of the author of this work that the law of damages may be profitably divided as other subjects have been, into its proper branches. He conceives, as he tells us in the preface, that damages by corporations (injuries done by them) as a separate branch of the law of damage, may be separated. It is undoubtedly true that the application of the subject of damages by corporations constitutes by far the larger share of the subject of damages, and in that view a work on the distinct title of damages by corporations is of value, especially as the more important treatises on the subject of damages do not discuss it with special reference to damages caused by corporations. This work is in two volumes of 700 pages each, and treats successively of the nature of corporations, of eminent domain, of damages by municipal corporations, of highways, of nuisance, of injuries by railroad corporations, of injuries resulting in death, of injuries to children, of damages to passengers by land and water and of damages to baggage, of damages to freight by water and by land, of damages to live animals by common carriers, of the liability of express companies, of telegraph companies, of mining corporations, of banks and of gas light companies.

In the appendix will be found condensation of statutes giving a remedy for injuries resulting in death. An examination of the book has satisfied us that the author has given the subject much study.

The work bears evidence throughout of careful preparation and exhaustive research. The style of the author is pleasing, and we have no doubt the work will be found of great value, especially to corporation lawyers. It is well printed with a first class index and is published by the Lawyers' Co-operative Publishing Co., Rochester, N. Y.

LAWYERS' REPORTS ANNOTATED, Books XIII, XIV.

We have had occasion heretofore, to speak of the admirable manner in which these reports are prepared. The volumes contain all current cases of general value and importance, decided in the United States, State and territorial courts, with full annotation by Robert Desty. The selection of cases for publication is good, and we have not been able to find any leading cases unpublished. It is unnecessary to state that the annotations by the editor, Mr. Desty, are complete and exhaustive.

The two volumes before us, contain many important cases and a large number of valuable annotations, so many in fact that it would be difficult to make special mention. We commend very heartily this series of reports to the profession.

AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW, VOL. I.

This volume contains exhaustive articles on Patent Law, Payment, Perpetuities, Pleading, Pledge, Poor and Poor Laws, and Powers. Besides these are many others on less extended topics. The character of the papers continues to be first class and the work, as it nears completion, exhibits the same care and industry which has been a feature of its older volumes. As the years go by and law books and reports multiply, this series of volumes will be found of increasing value.

BOOKS RECEIVED.

Principles of the Law of Real Property, Intended as a First Book for the Use of Students in Conveyancing. By the Late Joshua Williams, of Lincoln's Inn, one of Her Majesty's Counsel. The Seventeenth Edition, Re-arranged and partly Re-written by his Son, T. Cyprian Williams, of Lincoln's Inn, Barrister at Law, L. L. B. Late Lecturer on Conveyancing to the Incorporated Law Society of the United Kingdom. London: Sweet & Maxwell (Limited) 3 Chancery Lane, Law Publishers; Boston: The Boston Book Company. 1892.

HUMORS OF THE LAW.

Perhaps one of the most eloquent and distinguished lawyers of Maine at the close of the revolutionary war was William Symmes of Portland. He was arguing a motion one day before Judge Thacher, and presisted, though constantly interrupted by the court.

Thacher grew impatient and said, "Mr. Symmes, you need not presist in arguing the point, for I am not a court of errors, and cannot give a final judgment." "I know," answered Symmes, "that you can't give a final judgment, but as to your not being a court of errors I will not say."

In a law case, in which a question of identity was being discussed, the cross-examining advocate said to the witness, "and you would not be able to tell him from Adam?"

"You have not yet asked the witness, Mr. X," interrupted the judge, speaking in a studiously deliberate manner, "whether he is acquainted with the personal appearance of the personage whose name you have just mentioned. There must be order in your questions."

Recently a northern recorder who is noted for the length and solemnity of his exhortations was addressing an old Irishwoman who had been convicted, not for the first time, of some trifling offense. His honor had gone on for half an hour or so, when suddenly the prisoner flopped on the floor of the dock. As the warder was trying to get her on her feet again, she made a remark in a very bitter and discontented tone. The recorder not catching the drift of it asked the warder in his most impressive manner,—

"Warder what does the prisoner say?"

"She says, your honor," replied the warder, with evident sympathy, "that she can stand penal servitude, but she's d——d if she can stand this."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACTION—Distinctions as to Form.—Code Civil Proc. § 1 abolishing the distinction between suits at law and in equity, and the forms of actions theretofore existing, does not abolish equity, or the nature and manner of determining a suit, but controls only its form; and a court therefore, in proceeding under the "Town-Site Act," (Gen. St. 1883, ch. 108, § 14), to the determination of an adverse claim to a lot, commits no error in refusing a jury, and proceeding in equity to a decree.—RICE V. GOODWIN, Colo., 30 Pac. Rep. 330.

2. ADMIRALTY — Charter Party.—Quarantine regulations which interfere with the charter engagements of a vessel are fairly within the clause of a charter excepting liability for results caused by "restraints of princes, rulers, and people."—THE PROGRESO, U. S. C. C. of App., 50 Fed. Rep. 835.

3. APPEAL.—A motion for a new trial, which only stated that "the verdict is contrary to and not supported by the evidence," is too general and the evidence will not be reviewed on appeal.—DEGENER V. O'LEARY, Tex., 19 S. W. Rep. 1004.

4. APPEAL—Assignments of Error.—Under Civil Code, § 232, requiring an exception to "be stated with so much of the evidence or other matter as is necessary to explain it, but no more," exceptions taken to rulings of the trial court, based on the facts of the case, will not be considered on appeal, where the alleged bill of exceptions is merely the whole testimony and proceedings of the trial as it took place, extended from the stenographer's notes, with no attempt to accompany each exception with the evidence relevant thereto.—EATON V. OREGON RY. & NAV. CO., Oreg., 30 Pac. Rep. 311.

5. APPEAL—Injunction.—An order of a judge in vacation, dissolving a temporary injunction, is not appealable, since such an order, even though the bill prays for no relief except an injunction, is not a final disposition of the suit.—GREVE V. GOODSON, Ill., 31 N. E. Rep. 677.

6. APPEAL — Intermediate Judgment.—The right to appeal from an intermediate judgment is not confined to those cases where notice is given of such appeal within the 10 days limited by law, but the court, in reviewing the final judgment, may, under section 11 of the Code, review also any intermediate judgment affecting the said judgment, whether notice has been given of appeal therefrom or not.—MCCRADY V. JONES, S. Car., 15 S. E. Rep. 430.

7. APPEAL—Report of Referee.—The report of a referee upon questions of fact has the same effect as the verdict of a jury, and will not be set aside as being against the weight of evidence, unless it is clearly wrong.—STATE V. CRABTREE, Neb., 52 N. W. Rep. 842.

8. APPEAL BOND—Description of Judgment.—Where the bond on appeal from a justice court correctly states the number and style of the cause and the court in which the judgment was rendered, the appeal should not be dismissed as insufficiently describing the judgment, though all of the parties against whom it is entered are not named, the amount is misstated, and the date of entry can only be inferred from the date of the verdict.—WARREN V. MARBERRY, Tex., 19 S. W. Rep. 994.

9. ATTACHMENT.—Pub. St. ch. 237, § 12, which provides that the debtor may dissolve an attachment before its proceeds have been applied to the payment of the claim or judgment, and within 60 days after such attachment, by making an assignment for the benefit of his creditors, and having it recorded, does not apply where, before the recording, the trustee had appeared and answered, and the court had charged him with the amount in his hands.—ALVES V. BARBER, R. I., 24 Atl. Rep. 528.

10. ATTACHMENT—Exemptions.—One carrying on the trade of a tailor may be entitled to the exemption (from attachment or execution) of two sewing machines, if kept and personally used for the purposes of his trade, and if reasonably necessary therefor.—CRONFELDT V. ARROL, Minn., 52 N. W. Rep. 857.

11. ATTORNEYS — Collections.—Where an attorney receives notes, which he afterwards reduces to judgment, with directions "to do with them the best that he can," it is a question for the jury what was the meaning of such directions, and it cannot be said, as a matter of law, that the attorney was authorized to accept, as satisfaction, other property than money.—MOORE V. MURRELL, Ark., 19 S. W. Rep. 973.

12. BANKS—Authority of Vice-president.—The C bank in good faith advanced money on collateral forwarded to it by the vice-president of the F bank, and charged the loan to the F bank. The vice-president of the F bank directed that the loan be transferred to his individual credit, which was done, whereupon he fraudulently checked out the same for private purposes: Held, that the vice-president had authority to negotiate the loan, and that the validity thereof was not affected by his fraud.—CHEMICAL NAT. BANK V. ARMSTRONG, U. S. C. C., Ohio, 50 Fed. Rep. 798.

13. BONDS — Construction.—Under an agreement entered into and contained in a bond, whereby defendants bound themselves to repay plaintiff "all reasonable sums of money by it paid out in the manner of securing a right of way, depot grounds, and terminal facilities" for a railroad, defendants must repay expenditures incurred thereunder after the date, but before formal delivery, of the bond.—OREGON RY. & NAV. CO. V. SWINBURNE, Oreg., 30 Pac. Rep. 322.

14. BROKERS — Commissions.—Where defendant agreed to pay a commission to plaintiff if he sold defendant's saloon business, and plaintiff procured a purchaser who agreed to buy, but by the agreement title did not actually pass, and afterwards the purchaser abandoned the transaction, plaintiff is not entitled to a commission.—KOST V. REILLY, Conn., 24 Atl. Rep. 519.

15. CARRIERS — Passengers.—In ejecting a passenger from the street car the conductor can use no more force than is necessary for that purpose, and if he do so the the company will be liable.—HAMAN V. OMAHA HORSE RY. CO., Neb., 52 N. W. Rep. 830.

16. CARRIERS — Passenger—Negligence.—In an action against a railroad company for personal injuries sustained in alighting from a train which had been run past the depot platform, an instruction that if the conductor had offered to back up to the platform for plaintiff, but was requested by her, not to do so, and

had thereupon assisted her with ordinary care, there could be no recovery, was not objectionable, in including only the defense of contributory negligence.—CONWILL V. GULF, C. & S. F. RY. CO., Tex., 19 S. W. Rep. 1017.

17. CARRIERS OF GOODS—Negligence.—A railroad company in drawing a car load of live stock is liable as a common carrier, though the car is the private property of the stock owner.—FORDYCE V. MCFLYNN, Ark., 19 S. W. Rep. 961.

18. CARRIERS OF GOODS—Shipping—Damage.—Goods liable to injure each other may be carried in the same ship, if it be the general usage to carry them together, provided all proper means are employed to prevent injury.—THE GLAMORGANSHIRE, U. S. D. C. (N. Y.), 50 Fed. Rep. 840.

19. CARRIERS OF PASSENGERS—Connecting Lines.—A ticket issued, not as a coupon ticket, but as the joint contract of several carriers, entitles the purchaser to transportation by each of said carriers, notwithstanding that the delay of one of them may have occasioned the expiration of the ticket before its presentation to all.—GULF, C. & S. F. RY. CO. V. LOONEY, Tex., 19 S. W. Rep. 1039.

20. CHATTEL MORTGAGES.—A mortgagee, after due notice, may sell a sufficient amount of the mortgaged property to satisfy the mortgage debt; but, if he sell more than sufficient to satisfy the same and costs necessarily incurred, he will be liable for conversion of such excess.—OMAHA AUCTION & STORAGE CO. V. ROGERS, Neb., 52 N. W. Rep. 826.

21. CONTRACT — Construction.—Where an instrument contains the exact terms agreed on by the parties, and expresses their intent and meaning, the fact that they thought it a mortgage, while it was in fact a conditional sale, does not change its character or effect.—HERSHEY V. LUCE, Ark., 19 S. W. Rep. 963.

22. CONTRACT—Construction.—The plaintiffs and the defendants having agreed, in case of disputes or differences as to the construction of their contract, or the sufficiency of the performance of any of the work to be done under it, or the price to be paid, to submit them to the civil engineer in charge, who was to consider and finally decide them, are bound by the measurements made, and by the decision of the selected arbitrator.—O'DONNELL V. FORREST, La., 11 South. Rep. 245.

23. CONTRACT—Parol Evidence.—The question whether a paper setting forth a bilateral, executory contract, signed only by one of the parties, was delivered and assented to as containing the whole contract, is one for the jury under suitable instructions, and evidence of previous and contemporaneous conversations between the parties to prove that the paper was only a partial memorandum, it being inconsistent on its face with that view, is admissible.—THOMAS V. BARNS, Mass., 31 N. E. Rep. 683.

24. CONTRACT — Services — Member of Family. — Ordinarily where services are rendered and voluntarily accepted, the law will imply a promise upon the part of the recipient to pay for them; but where the services are rendered by members of a family, living as one household, to each other, there will be no such implication, from the mere rendition and acceptance of the services.—DISBROW V. DURAND, N. J., 24 Atl. Rep. 545.

25. CONTRACT — Work and Labor. — When a person performs work or furnishes material beneficial to the property of another, a promise to pay therefor by the owner may sometimes be implied from circumstances; but the circumstances must be such as fairly indicate the owner's intention to pay, or such as equitably estop him, from denying his liability to pay; the mere fact that the property has been improved will not suffice.—MANN V. FARNUM, Colo., 30 Pac. Rep. 332.

26. CONTRACTS FOR BUILDING — Extras. —A written building contract provided that the contractor should, to the satisfaction of the architects, perform and finish "all work included in the entire completion" of the building for a named sum, and that he should make no claim for additional work unless the same should be done pursuant to a written order from the architects, and that written notice of all claims should be given the architects within three days of the beginning of such work: Held that, in the absence of an agreement modifying the original contract, the builder was not liable for extra work unless it was done on a written order.— WORTMAN V. KLEINSCHMIDT, Mont., 30 Pac. Rep. 280.

27. CORPORATION— Dissolution — Equity.—A court of equity has no inherent authority to dissolve a corporation and deprive it of its franchises for nonuser or misuser of its corporate powers, nor because it was not organized in accordance with the requirements of the law by which it was created. — ELIZABETHTOWN GASLIGHT CO. V. GREEN, N. J., 24 Atl. Rep. 560.

28. CORPORATIONS— Increase of Stock.—Where an association increases its capital stock to represent profits actually invested in extending its business and increasing the value of its plant, and apportions new shares *pro rata* among the existing shareholders, the new shares represent capital, and not "income" or "dividends," and do not pass by a gift of the original shares by deed of trust "to and for the use of" another, and "to pay over to her the dividends and income thereof" during her life, and on her decease "to reconvey and transfer said stock" to the donor.—SPOONER V. PHILLIPS, Conn., 24 Atl. Rep. 524.

29. CORPORATIONS— Jurisdiction.—The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri.— KIMBALL V. ST. LOUIS & S. F. RY. CO., Mass., 31 N. E. Rep. 697.

30. COUNTY WARRANTS — Seal. — Section 603, Comp. Laws, requires the seal of the county to be attached to every county warrant. This makes such warrant a "sealed instrument," within the meaning of section 4849, Comp. Laws, providing that actions on "sealed instruments" shall be brought within 20 years.—HEFFLEMAN V. PENNINGTON COUNTY, S. Dak. 52 N. W. Rep. 851.

31. COVENANTS AGAINST BUILDING.— A purchaser of a lot whose deed contains a covenant against the erection of any building within a certain distance of the curb line cannot maintain an action against a subsequent purchaser of an adjacent lot from her grantor for violation of a like covenant where there was no such covenant between the two purchasers, and their grantor, although he required similar covenants from all purchasers, did not covenant with the first that he would exact them from subsequent purchasers.—MULLIGAN V. JORDAN, N. J., 24 Atl. Rep. 543.

32. COVENANTS OF WARRANTY.—Where a purchaser of land agreed to pay a purchase-money note payable to a remote grantor, which was made, and successively assumed, under an agreement whereby, if the title to certain portions of the land should prove defective, such portions should be reconveyed, and a credit made on the note, he could elect to pay the same, although the title was bad, and upon failure thereof could avail himself of his remedy on the warranty of his immediate grantor.—WOOD V. THORNTON, Tex., 19 S. W. Rep. 1034.

33. CRIMINAL EVIDENCE—Confession.—Confessions or criminating admissions made by the accused to a person having him in legal custody are not incompetent as evidence against him solely because the accused probably believed, in consequense of false representations made by his custodian to a crowd in his hearing, that the latter had come for him at the instance of his mother, and intended to befriend him by employing counsel in his behalf if he was innocent.—MARABLE V. STATE, Ga., 15 S. E. Rep. 453.

34. CRIMINAL EVIDENCE—Dying Declarations.—Dying declarations are admissible only as to things to which deceased could testify as a witness, if living, and mus

state facts and not opinions. — MATHERLY V. COMMONWEALTH, Ky., 19 S. W. Rep. 977.

35. CRIMINAL EVIDENCE — Homicide. — In a trial for homicide, in order to rebut the inference of defendant's guilt from the fact of flight, by showing that it was due to fear of the father of deceased, testimony that "defendent seemed afraid" is inadmissible, being a mere opinion of the witness, based on the conduct or declaration of defendent himself.—LEWIS V. STATE, Ala., 11 South. Rep. 259.

36. CRIMINAL LAW — Assault and Battery. — On a trial for assault, the court properly refused to charge that a police officer might justify an assault on the ground that it was committed as a means of suppressing disorder.— STONE V. STATE, ARK., 19 S. W. Rep. 968.

37. CRIMINAL LAW—Homicide.—It is not the duty of a person to retreat from a room which he rents and is occupying as a bedroom, but he may stand his ground therein, and defend himself, even to the death of an assailant who is, or reasonably appears to be, about to kill or inflict grievous bodily harm on him.—HARRIS V. STATE, Ala., 11 South. Rep. 255.

38. CRIMINAL LAW—Homicide.—A man is presumed to intend that which he does, or which is the immediate or necessary consequence of his act; and if the prisoner, with a deadly weapon in his possession, without any or upon very slight provocation, gives to another a mortal wound, the prisoner is *prima facie* guilty of willful deliberate, and premeditated killing; and the necessity rests upon him of showing extenuating circumstances; and unless he proves such extenuating circumstances, or they appear from the case made by the State he is guilty of murder in the first degree.—STATE V. WELCH, W. Va., 15 S. E. Rep. 419.

39. CRIMINAL LAW—Homicide— Insanity.—An instruction that if, at the time defendant killed his wife, he was insane, laboring under such a defect of reason and derangement of mind as not to know and comprehend the nature, quality, and consequences of the act he was doing, and unable to distinguish between right and wrong, he must be acquitted, and the insanity must be proved, beyond a reasonable doubt, to be such that at the time he labored under a diseased state of mind, so excessive as to overwhelm his reason, conscience, and judgment, is sufficient, where there is evidence of insanity as the result of delirium tremens.—STATE V. ZORN, Oreg., 30 Pac. Rep. 317.

40. CRIMINAL LAW — Homicide—Self Defense.—Where defendant voluntarily puts himself under the influence of liquor, and in consequence acts in an exaggerated or unjustifiable belief as to the necessity of taking the life of deceased, such belief will not avail as a defense on a prosecution for murder.—SPRINGFIELD V. STATE, Ala., 11 South. Rep. 250.

41. CRIMINAL LAW—Jury— Women.—The exclusion of women from the jury on the criminal prosecution of a man does not deprive him of the rights, privileges, and immunities accorded to him by Const. U. S. Amend. 14, since the amendment only prohibits discrimination because of race or color, and not because of sex. —MCKINNEY V. STATE, Wyo., 30 Pac. Rep. 293.

42. CRIMINAL LAW — Punishment. — A misdemeanor, where no statute fixes the punishment, is punished by fine or inprisonment in jail, or both, at the discretion of the court —EX PARTE GARRISON, W. Va., 15 S. E. Rep. 417.

43. CRIMINAL PRACTICE—Finding of Indictment.—The finding of an indictment must appear from the order book of the court in which defendant was indicted. If it does not so appear a verdict and judgment against him must be reversed.—SIMMONS V. COMMONWEALTH, Va., 15 S. E. Rep. 386.

44. CRIMINAL PRACTICE — Murder.—An indictment for murder is defective if it fails to charge that the crime was "feloniously" committed. —STROUD V. COMMONWEALTH, Ky., 19 S. W. Rep. 976.

45. CRIMINAL PRACTICE—Perjury.—Under Code Proc. § 1234, requiring an indictment to state the acts constituting the offense in such manner as to enable a person of common understanding to know what is intended, an indictment for perjury is bad on demurrer which alleges that it was committed by S "upon a proceeding wherein the State of Washington was plaintiff and S was defendant, why said S should not be punished for contempt," etc.—STATE V. SEE, Wash., 30 Pac. Rep. 327.

46. DEATH BY WRONGFUL ACT— Killing of Prisoners by Mob.— Under Rev. St. Tex. art. 2899, a United States marshal, who knowing that certain lawless persons are hostile to a prisoner in his custody, delivers him for transport, shackled, to a deputy, whom he knows to be incompetent and unfit, is liable on his official bond, because on his own negligence, for the killing of such prisoner by a mob, through the deputy's unfitness.—ASHER V. CABELL, U. S. C. C. of App., 50 Fed. Rep. 818.

47. DEED—Contingent Remainders. — Under Rev. St. 1889, § 8838, where a deed conveyed land to C "for and during her natural life, and with remainder to the heirs of her body," and C at the execution of the deed had six children living, that such children took a contingent remainder, though C was then of such age as to render future issue impossible. — EMMERSON V. HUGHES, Mo., 19 S. W. Rep. 979.

48. DEED—Description. — Where property is platted, and thereafter described in a sheriff's deed without regard to the plat, but by its former name, and it is shown that it is so known in the neighborhood and assessed for taxes, the decription in the deed is sufficient. —STEWART V. PERKINS, Mo., 19 S. W. Rep. 989.

49. DEED—Destroyed Records.—Under Rev. St. art. 4292, requiring that where county records are destroyed deeds which are preserved shall be re-recorded within four years in order that the first record shall be effective, where such deeds are not so re-recorded after the destruction of the records the first record does not constitute notice as against a *bona fide* purchaser.— MAGEE V. MERRIMAN, Tex., 19 S. W. Rep. 1002.

50. DEPOSITIONS—Error.—Under Rev. St. art. 2229, providing that the officer to whom a commission to take a deposition is directed shall take the answers to the interrogatories, a deposition consisting of answers prepared by one of the counsel from statements made to him by deponent, and afterwards sworn to by deponent, should be suppressed.—PHŒNIX ASSUR. CO. OF LONDON V. FREEDMAN, Tex., 19 S. W. Rep. 1011.

51. DIVORCE—Cruelty.—As a ground for divorce, Civil Code, § 94, defines extreme cruelty as "the infliction of grievous bodily injury or grevious mental suffering upon the other by one party to the marriage.:" Held that, where the complaint shows that the act complained of caused grievous mental suffering, it is sufficient without showing that such acts had an injurious effect on plaintiff's health.—BARNES V. BARNES, Cal., 30 Pac. Rep. 298.

52. DIVORCE—Res Adjudicata.—A decree of divorce by a court having jurisdiction of the parties and subject-matter is a complete bar to a subsequent suit between the same parties for the same relief, whether it was granted on sufficient facts to constitute a cause of action or not.—CRABILL V. CRABILL, Oreg., 30 Pac. Rep. 320.

53. DIVORCE—Retroactive Laws.—Comp. Laws 1888, § 2602, providing for a divorce in certain cases, and repealing Comp. Laws 1876, p. 375, on the same subject, does not take away or impair any right to a divorce which accrued under the earlier act, in the absence of any specific provision to that effect.—TUFTS V. TUFTS, Utah, 30 Pac. Rep. 309.

54. EQUITY—Evidence.—Where one party to a contract has testified to his recollection of the matter involved, and the other party, after testifying, dies suddenly before cross-examination, such testimony is nevertheless admissible, in a court of equity, under a statute putting both parties to a contract on a plane of mutuality, and declaring that in case of death the

testimony of the survivor shall not be received.—SCOTT v. MCCANN, Md., 24 Atl. Rep. 586.

55. EVIDENCE — Declarations.—The declarations of a person in the possession of property as to his title are admissible evidence against him and all persons claiming under him.—CUNNINGHAM v. FULLER, Neb., 52 N. W. Rep. 836.

56. EVIDENCE—Entries in Census Books.—In an action against a probate judge to recover the statutory penalty for illegally issuing a license for the marriage of plaintiff's daughter, the memorandum, made by a census enumerator, of plaintiff's statement in regard to the daughter's age, is inadmissible, unless the enumerator, after examining it, cannot testify to a present recollection of the fact noted.—BATTLES v. TALLMAN, Ala., 11 South. Rep. 247.

57. EXECUTION — Validity.—An execution issued to a county other than the one in which the judgment was rendered is valid though taken from the clerk's office before the judgment is docketed in the county to which it runs, but not delivered to the sheriff for service until after the judgment is so docketed.—GOWAN v. FOUNTAIN, Minn., 52 N. W. Rep. 862.

58. FALSE REPRESENTATIONS — Directors of Corporations.—An action for damages for fraudulently inducing the plaintiff to take the notes of a foreign corporation by the false representations of its officers, as to the amount of its paid-up capital stock, cannot be maintained against them by proof of the falsity of their statement of the amount of its paid-up capital stock, filed with the State commissioner as required by St. 1884, ch. 330, § 3, since such statement is not addressed to or intended for the public.—HUNNEWELL v. DUXBURY, Mass., 31 N. E. Rep. 700.

59. FEDERAL COURTS—Appeal to Circuit Court of Appeals.—An appeal taken to the Circuit Court of Appeals more than six months after entry of the decree must be dismissed, under Judiciary Act 1891, § 11.—COULLIETTE v. THOMASON, U. S. C. C. of App., 50 Fed. Rep. 787.

60. FIXTURES.—An engine and boiler, placed in a specially built gin house, which cannot be removed without unscrewing and detaching it from bolts running through a solid rock and mortar foundation in an excavation of the floor, without which the engine could not be securely held and operated; a gin stand, set on the floor, and held in place by pieces of lumber nailed around and against it to hold it in place; and a cotton press in an adjoining room, built for it, the press screw working up and down into a hole nine feet deep, around which the press was fastened to the floor—are part of the realty.—JONES v. BULL, Tex., 19 S. W. Rep. 1031.

61. GIFTS CAUSA MORTIS—Delivery.—The gift, among other things, of the keys of a box deposited in the vaults of a bank containing bonds, stocks, etc., was sufficient as a constructive delivery of the contents of the box; and the existence of a duplicate set of keys, placed in the hands of a trusted friend theretofore as a precaution in case of loss, did not impair the validity of the gift.—THOMAS' ADMR. v. LEWIS, Va., 15 S. E. Rep. 389.

62. GUARANTY—Evidence—Parol.—In an action on a written guaranty, "If you will bear with them, [the principals], I will see that you are paid"—the guarantor cannot limit his liability by showing by parol evidence that he did not know at the time the debt exceeded a certain amount.—WILKINS v. CARTER, Tex., 19 S. W. Rep. 997.

63. HIGHWAYS—Laying Out.—Where a town, by its authorized officers, appeared before the board of county commissioners pursuant to notice, and without objection participated in the hearing of a petition to lay out a highway, it cannot afterwards object to the organization of the board when the notice was issued.—INHABITANTS OF HYDE PARK v. COUNTY COM'RS. OF NORFOLK, Mass., 31 N. E. Rep. 693.

64. HOMESTEAD.—A house built on land on which the owner himself lives, and rented continuously to another, without ever being used in connection with his own house, or for any household or domestic purposes, or as a place of abode for any one of his own family, is not a part of the homestead, though inclosed by the same fence; nor can the owner's mere intention to make it part of the homestead have that effect.—MCDONALD v. CLARK, Tex., 19 S. W. Rep. 1023.

65. HOMESTEAD—What Constitutes.—Where plaintiff's business house occupied a portion of several lots, and plaintiff regarded the unoccupied portion of such lots as part of his business homestead, and never rented the lots to any one, or permitted any use thereof, except to a keeper of an hotel adjoining the lots to put firewood thereon, and that he used the lots for piling thereon goods sold by him in his business, it cannot be said that the part of the lots not covered by the business house is not exempt as a business homestead because put to a use foreign to plaintiff's business.—LEAVELL v. LAPOWSKI, Tex., 19 S. W. Rep. 1004.

66. INJUNCTION.—Lots in a subdivision in the residence part of a city were sold subject to certain restrictions as to building, which restrictions were designed to preserve the character of the land as residence land. After the lapse of 38 years, the locality having become a business neighborhood, the owner of one of said lots put up a building contrary to the restrictions in his deed: Held, that the erection of such building would not be enjoined at the suit of the owner of another lot, since the reason of the restriction had ceased.—JACKSON v. STEVENSON, Mass., 31 N. E. Rep. 691.

67. INJUNCTION—Contempt.—If a railroad company is enjoined to abate a nuisance, the court of chancery will not entertain the excuse that its agents and servants have disobeyed the instructions given them to remove it. The company must obey the order of the court, even if it has to discontinue the running of trains upon its road. Until the injunction is modified or removed, the company must conform to it.—PENNSYLVANIA R. CO. v. THOMPSON, N. J., 24 Atl. Rep. 544.

68. INSURANCE—Conditions of Policy.—Where the title to property insured by a married woman is held by her as security for a debt due from her husband, a conveyance of the property by her to her husband's assignee in insolvency is a breach of a condition in the policy against alienation, even though the wife, as creditor of her husband, has an interest in the property while held by the assignee.—BROWN v. COTTON & WOOLEN MANUF'RS MUT. INS. CO. OF NEW ENGLAND, Mass., 31 N. E. Rep. 691.

69. INSURANCE — Limitation.—Where a fire insurance policy provides that no action shall not be maintained thereon until after an arbitration has been had and an award made, nor unless the action shall be commenced within 12 months from the date of the fire, but does not limit the time within which the arbitration must be had, the 12-months' limitation does not begin to run until an award has been made.—HONG SLING v. ROYAL INS. CO., Utah, 30 Pac. Rep. 307.

70. INSURANCE COMPANIES—License.—The issuing of a license to a foreign insurance company to do business in this State by the superintendent of insurance is a ministerial, and not a judicial, act, and is therefore not a bar to a proceeding in *quo warranto*, where it is charged with exercising franchises and privileges without authority of law.—STATE v. FIDELITY & CASUALTY INS. CO. OF NEW YORK, Ohio, 31 N. E. Rep. 658.

71. INTOXICATING LIQUORS — Illegal Sale.—An indictment for selling liquors in violation of section 1, ch. 32, Code 1891, is good, though it does not name the purchaser.—STATE v. CHISNELL, W. Va., 15 S. E. Rep. 412.

72. INTOXICATING LIQUORS—Sale.—The sale of whisky sent by express "C. O. D." is not complete until the whisky is delivered and paid for; and the express agent making the delivery and collection, in a county where sale is lawfully prohibited, is subject to indictment if he acts knowingly in completing the sale. His knowledge may be inferred from circumstances as well as proved by direct evidence. Good reason to know is

equivalent to knowledge; willful ignorance will not avail.—GRABB v. STATE, Ga., 15 S. E. Rep. 455.

73. INTOXICATING LIQUORS — Sale to Minor. — An indictment under section 16, ch. 32, Code 1887, against a person having a license to sell spirituous liquors, for a sale to a minor, need not specify the particular place where the sale was made, or allege that the place where the sale was made was the place designated in the license as the place at which the license was to be exercised.—STATE v. BOGGESS, W. Va., 15 S. E. Rep. 423.

74. JUDGMENT—Correction.—A judgment establishing a ditch, and ordering its construction, though remaining on the court docket until the commissioner reports the work done, is a final judgment; and a motion for a *nunc pro tunc* correction as to costs omitted by mistake therefrom cannot be made, except on notice to all parties or their voluntary appearance.—PERKINS v. HAYWOOD, Ind., 31 N. E. Rep. 670.

75. JUDGMENT—Injunction.—Where a defendant in an action at law offers to prove an estoppel *in pais* against the plaintiff, and the offer is overruled by the trial court, on the ground that the defense is not cognizable in such action, and the defendant takes no exception, but acquiesces in such ruling as the law of the case, he is not estopped from filing a bill in a court of equity, setting up the same facts, to enjoin the enforcement of a judgment obtained against him in the said action.—BORCHERLING v. RUCKELSHAUS, N. J., 24 Atl. Rep. 547.

76. LANDLORD AND TENANT—Defective Sewer.—A landlord is liable for injury to his tenant by negligently connecting his cellar drain pipe with a public sewer, with nothing to prevent the flow of water back from the sewer.—SMITH v. FAXON, Mass., 31 N. E. Rep. 687.

77. LANDLORD AND TENANT — Landlord's Assignee.—An assignee of a landlord's reversionary interest can file an affidavit to dispossess a tenant in a summary proceeding taken under the landlord and tenant act.—STATE v. IDLER, N. J., 24 Atl. Rep. 554.

78. LANDLORD AND TENANT—Lien for Rent.—Code, § 3069, provides for a landlord's lien "on the goods, furniture, and effects belonging to the tenant for his rent, which shall be superior to all other liens, except for taxes." Section 3070, subd. 2, provides that the lien may be enforced by attachment where the tenant has made an assignment for the benefit of his creditors: Held that, where the tenant assigned a stock of goods on which a landlord's lien existed, and the assignee converted the same into money, the landlord may recover by garnishment the money in the hands of the assignee in an attachment suit against the tenant.—MCKLEROY v. CANTEY, Ala., 11 South. Rep. 258.

79. LIMITATIONS — Trespass to Try Title. — Where a person has such an interest in land as would entitle him to maintain trespass to try title, the statute of limitations will run against him in favor of an adverse holder.—DUTTON v. THOMPSON, Tex., 19 S. W. Rep. 1026.

80. LIMITATIONS—Written Evidence of Debt.—A letter which merely recites what has been done under a contract, which it assumes to have been previously made, and which does not state all the terms of the contract, is not an "evidence of indebtedness in writing," within the meaning of Rev. St. ch. 83, § 16, which provides that actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing, may be begun within 10 years after the cause of action accrues.—WOOD v. WILLIAMS, Ill., 31 N. E. Rep. 681.

81. LIMITATION OF ACTIONS—Absence from County.—Article 69, § 4, of the Code, which declares that debtors absenting themselves from the State, or wandering from county to county, so that creditors may be uncertain of finding them, shall not have the benefit of any limitation prescribed by law, does not apply to a case in which there is no element of fraud nor any concealment of residence on the part of the debtor.—FINK v. ZEPP, Md., 24 Atl. Rep. 538.

82. MARRIAGE—Validity.—The fact that a minor resident in Massachusetts is married in another State for the sole purpose of evading the provision of the Massachusetts law requiring the father's consent to the marriage of a minor son does not invalidate the marriage.—COMMONWEALTH v. GRAHAM, Mass., 31 N. E. Rep. 706.

83. MASTER AND SERVANT.—An employer is not liable for personal injuries to his servants, caused by defects in machinery, if no danger could be supposed to exist from the defects under any circumstances, after the exercise by the servants of ordinary care, skill, and diligence. — TRINITY COUNTY LUMBER CO. v. DENHAM, Tex., 19 S. W. Rep. 1012.

84. MASTER AND SERVANT — Assumption of Risk. — Plaintiff, while employed as a brakeman on defendant's railroad train, was thrown from a car and injured, because of the uneven condition of a new side track on which the train was running. The condition of the track was obvious, and plaintiff had made several trips over the same road prior to the accident: Held, that defendant was guilty of no negligence in its duty to plaintiff, and plaintiff could not recover.—O'NEILL v. CHICAGO & I. C. RY. CO., Ind., 31 N. E. Rep. 669.

85. MASTER AND SERVANT — Fellow-servants.—A railroad foreman, having full charge of the loading of cars in a gravel pit, with power to hire and discharge laborers, and to direct their work, is not a fellow servant of such laborers. — ANDRESON v. OGDEN UNION RAILWAY & DEPOT CO., Utah, 30 Pac. Rep. 305.

86. MASTER AND SERVANT—Negligence.—A hand car is a car, within Code 1886, § 2590, subd. 5, allowing recovery by an employee of his employer for personal injuries received in the employment by reason of the negligence of an employee of the same person having charge of an engine, car, or train on a railway.—KANSAS CITY, M. & B. R. CO. v. CROCKER, Ala., 11 South. Rep. 262.

87. MECHANICS' LIENS.—Plaintiff furnished lumber to the owner of a lot for the erection of three separate houses thereon, which were built at the same time, and, when partly finished, were mortgaged separately. All the lumber was furnished under one contract, and no separate account was kept of how much went into the building of each house: Held, that under Gen. St. 1888, § 3018, giving the right to a mechanic's lien on every building in the construction of which, or of any of its appurtenances, the lienor's claim arose, though plaintiff was entitled to a lien on each house for what lumber went into its construction, he could not have one lien on all the houses for lumber used in the construction of them all.— WILCOX v. WOODRUFF, Conn., 24 Atl. Rep. 521.

88. MECHANIC'S LIEN— Estoppel.—In an action to enforce a mechanic's lien on buildings erected on land for one F, not the owner thereof, an admission by the true owner that he had sold the land to F does not estop him to deny that F is the owner, where it is not shown that plaintiff knew of such admission or relied on it. — MILLER HARDWOOD LUMBER CO. v. WILSON, Ark., 19 S. W. Rep. 974.

89. MECHANICS' LIENS— Priority of Mortgage.—Under the mechanic's lien law of this State the person who furnishes any material for the construction of a building by virtue of a contract, express or implied, with the owner thereof, is entitled to a lien thereon for the amount due for the same upon filing a sworn statement of his account with the register of deeds of the proper county within four months of the time of furnishing such material.— LIVESEY v. BROWN, Neb., 52 N. W. Rep. 838.

90. MORTGAGE BY PARTNERSHIP. — A mortgage executed by one only of two partners in the presence of the other, and with his consent, as security for a firm debt, is binding upon the firm.—GREER v. FERGUSON, Ark., 19 S. W. Rep. 966.

91. MUNICIPAL CORPORATIONS — Defective Streets. — Where an excavation is made in a public street under contract with the city authorities, such city cannot shift the responsibility for keeping its streets in a safe

condition onto a contractor, and thus relieve itself from liability for neglect to erect proper barriers to prevent accident and falling into such excavation. It may no doubt require a contractor to indemnify against loss occasioned by such accident.—CITY OF OMAHA V. JENSEN, Neb., 52 N. W. Rep. 833.

92. MUNICIPAL CORPORATIONS—Streets.—A city which has discontinued part of a street is not liable in damages therefor to an owner of land which is diminished in value by the diversion of travel caused by closing the street, where the access from the land to the system of public streets remains substantially unimpaired.—STANWOOD V. CITY OF MALDEN, Mass., 31 N. E. Rep. 702.

93. MUNICIPAL CORPORATIONS—Streets.—An abutting owner can maintain a *certiorari* to review an ordinance changing the grade of a street in front of his property, and, if the change of grade is justified only as part of an entire scheme, he may question the legality of the scheme. — READ V. CITY OF CAMDEN, N. J., 24 Atl. Rep. 549.

94. MUNICIPAL IMPROVEMENTS —Estoppel.— When the authorities of a city change the grade of a street, appoint appraisers to assess the damages of abutting owners, and confirm the award when returned, the city, on the trial of an appeal taken by the land-owner from the assessment of damages, cannot urge defects and irregularities in its own proceedings in changing the grade to defeat a recovery.—SECOND CONGREGATIONAL CHURCH SOC. OF OMAHA V. CITY OF OMAHA, Neb., 52 N. W. Rep. 829.

95. NEGOTIABLE INSTRUMENT— Forgery— Evidence.—In an action against an administrator on a note signed by intestate and another person, the defense being that the note was a forgery, it is competent, after the introduction of evidence tending to show the genuineness of intestate's signature, to prove his statements to the effect that he had helped the other maker of the note, and that he did not think he would lose anything by it.—BEVAN V. ATLANTA NAT. BANK, Ill., 31 N. E. Rep. 679.

96. NEGOTIABLE INSTRUMENT—Parol Evidence.—In an action on a promissory note, parol evidence is inadmissible to show an oral agreement that the payee would save the sureties harmless, and satisfy the note out of collateral securities deposited by the principals. —STEWART V. ALBUQUERQUE NAT. BANK, Ariz., 30 Pac. Rep. 303.

97. NEW TRIAL—Surprise or Mistake.—Before a party can be granted a new trial on the ground of surprise and mistake, which was known or discovered before or during the trial, he must move for a continuance, or take steps for a postponement; and, in the absence from the record of a showing of such motion or effort, an order granting a new trial for such cause will be reversed, no presumption being indulged in that such motion or effort was made.— HOSKINS V. HIGHT, Ala., 11 South. Rep. 253.

98. PRINCIPAL AND AGENT—Collections.—The authority of an agent to collect need not be express, but may be implied; and where a bill for goods previously sold by him for the house he represents, together with a bill for goods sold directly by the house to the same customer, are sent to the agent, and both bills are by the latter presented to the customer, who pays both, whether, under all the circumstances, the sending of the bill to the agent implies authority in him to collect the money is a question of fact for the jury. That the bills had printed upon their face in small letters the words, "Bills payable at this office only," which the debtor did not notice, and of which he had no knowledge at the time he made the payment, would not necessarily negative the authority, if, from the other circumstances, it could be fairly implied.—LUCKIE V. JOHNSON, Ga., 15 S. E. Rep. 459.

99. PRINCIPAL AND AGENT—Sale.—Where an assertion in regard to certain cattle of plaintiff was made by him to an agent employed by defendants to buy the cattle, and the agent afterwards abandoned the negotiation, defendant is not affected with knowledge of such assertion made to his agent, in litigation arising from his subsequent purchase of the cattle through other parties.—IRVINE V. GRADY, Tex , 19 S. W. Rep. 1028.

100. QUIETING TITLE.— Equity will cancel and remove as a cloud from complainant's title a mortgage which it is alleged the mortgagee, because of his representations to complainant when the latter purchased the premises, is estopped to assert, even though complainant is not in possession.—FREEMAN V. BROWN, Ala., 11 South. Rep 249.

101. RAILROAD AID—Exemption from Tax.—A tax of five mills, voted a number of years since to aid in the construction of a railroad, which afterwards allowed the time to lapse within which to commence the work, the railroad having never taken any steps towards complying with the condition of the comtemplated contract, will not be considered in determining whether defendant exceeded its power in having a special five-mill tax levied and collected.—REYNOLDS & HENRY CONST. CO. V. POLICE JURY OF OUACHITA PARISH, La., 11 South. Rep. 236.

102. RAILROAD COMPANIES — Negligence.— Where, in an action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant.—ANDERSON V. CHICAGO, B. & Q. R. Co., Neb., 52 N. W. Rep. 860.

103. RAILROAD COMPANIES — Traffic Agreement. — A traffic agreement between two railroad companies which confers a license on the one to use the track of the other, and limits their right to make certain charges for freight and passengers, does not constitute a partnership between them, or make the one road the agent of the other.—ST. LOUIS, A. & T. RY. CO. V. NEEL, Ark., 19 S. W. Rep. 963.

104. RAILROAD CROSSINGS—Highways.—Though a railroad company is not obliged to construct a crossing over a road in common use, but not a highway, if it does it is liable for an injury resulting from its negligent construction thereof; but the fact that it puts an embankment across the road, and constructs no crossing, unless a way under a trustle constructed about 75 yards distant be considered such, is not conclusive that it intended such way to be used as a crossing.—GULF C. & S. F. RY. CO. V. MONTGOMERY, Tex., 19 S. W. Rep. 1015.

105. SALE— Contract.— An agreement by which one person under promise of benefit, agrees with another to withdraw an offer or bid for property to the State, offered for sale, so as to enable the latter, by the removal of competition, to buy it cheaper than he otherwise could, is void as being against public policy.—BOYLE V. ADAMS, Minn., 52 N. W. Rep. 860.

106. SALE—Warranty.—A machine which plaintiff had taken on trial having proved defective, in consideration of an undertaking of defendant that it would repair and fix it so that it would do good work, he bought it, and gave his promissory notes for the purchase price: Held, that the undertaking of the defendant was in the nature of an express promissory warranty against known defects, and was collateral to the main contract of sale; and that for its breach plaintiff had his right of action, although the purchase price of the machine was still unpaid. — FITZPATRICK V. D. M. OSBORNE & CO., Minn., 52 N. W. Rep. 863.

107 SPECIFIC PERFORMANCE — Compromise. — In an action for specific performance of a contract to convey land, where plaintiff, being acquainted with her rights in the premises, had about eight years before signed a contract agreeing on a compromise with defendant, whereupon he paid her part of the compromise price agreed on, and stood ready to pay the balance, the trial court properly dismissed the petition.—MITCHELL V. HENLEY, Mo., 19 S. W. Rep. 993

108. SPECIFIC PERFORMANCE — Contract.—Under Cor-

poration Act, §§ 54, 55, providing that nothing but money shall be considered payment of stock, except that directors may buy necessary property, and to the amount of the value thereof issue full-paid stock marked "Issued for property purchased," the directors of a corporation, the incorporators of which have agreed to give 60 per cent. of the stock to a person for two patents, are justified in refusing to issue such stock, one patent not having been perfected, and the articles made under the other being worthless.—EDGERTON V. ELECTRIC IMP. & CONST. CO., N. J., 24 Atl. Rep. 540.

109. SUNDAY LAW.—Hunting.—The act of 1873 (Code, § 4580), making it a misdemeanor to hunt any kind of game with gun or dogs, or both, on the Sabbath day, is not violative of the constitution of this State or of the United States.—GUNN V. STATE, Ga., 15 S. E. Rep. 458.

110. TAXATION—Costs of Highway — Taxing Districts —Constitutional Law.—Where, in the reasonable judgment of the legislature, certain territory is specially interested in the construction of a highway, but some localities in that territory more interested than others, it is competent for the legislature to divide the territory into different taxing districts, and apportion the burden of the improvement among them in accordance with their respective interests. The provision of the constitution, as to equality of taxation, does not require in such case that the rate of taxation in the different taxing districts shall be the same.—MALTBY V. TAUTGES, Minn., 52 N. W. Rep. 858.

111. TAXATION — Exemption — Schoolhouses.— Const. 1874, art. 16, § 5, providing that "school buildings shall be exempt from taxation," does not exempt them from assessments for local improvements.—BOARD OF IMPROVEMENT V. SCHOOL DIST. OF LITTLE ROCK, Ark., 19 S. W. Rep. 969.

112. TAXATION OF CORPORATIONS.—Under Pub. St. ch. 13, §§ 38-40, which provide that in taxing railroad corporations the aggregate value of the shares of their capital stock shall be taken as a basis of assessment, there should not be included in the assessment proposed but unissued new shares, although such shares are paid for, and have a market value.—BOSTON & A. R. CO. V. COMMONWEALTH, Mass., 31 N. E. Rep. 696.

113. TAXES— Voluntary Payment — Recovery.—When taxes illegally assessed have been paid voluntarily the money so paid cannot be recovered back, in the absence of fraud or mistake of fact. A mistake as to the law gives no right of action. — RICHARDSON V. CITY OF DENVER, Colo., 30 Pac. Rep. 332.

114. TELEGRAPH COMPANIES — Mental Suffering. — Where the complaint against a telegraph company shows that because of the delay in delivering a message plaintiff and his wife were prevented from being present to aid in directing the funeral of the latter's father, it presents an action for injury to feelings and mental suffering —WESTERN UNION TEL. CO. V. ERWIN, Tex., 19 S. W. Rep. 1002.

115. TELEPHONE COMPANIES — Negligence. — A telephone company which for several weeks permits its wire to remain suspended across a public highway, a few feet from the ground, is liable to a traveler who comes in contact therewith during an electrical storm, and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire — SOUTHWESTERN TELEGRAPH & TELEPHONE CO. V. ROBINSON, U. S. C. C. of App., 50 Fed. Rep. 810.

116. TENANTS IN COMMON — Adverse Possession. — A parol partition between tenants in common, followed by possession in conformity therewith, does not give each cotenant color of title to the entire fee of the part held by him. — SONTAG V. BIGELOW, Ill., 31 N. E. Rep. 674.

117. TOWN SUPERVISOR — Highways. — Town supervisors are the agents of the town, and possess only such powers as are expressly conferred upon them by statute, or as are necessary to enable them to perform the duties imposed upon them by law.—ALDRICH V. COLLINS, S. Dak., 52 N. W. Rep. 855.

118. USURY— Subsequent Agreement.— The fact that a note given in settlement of a valid demand is usurious does not affect the original demand.—TILLMAN V. THATCHER, Ark., 19 S. W. Rep. 968.

119. VENDOR AND PURCHASER— Purchasers.—Plaintiff in ejectment claimed title to an undivided portion of land through various mesne conveyances, none of which definitely described the land. The land had been partitioned, and defendant in ejectment was in possession of the whole under final decree therein. The description of the land in this final decree by clerical error differed from that in the interlocutory decree, thus apparently leaving the land claimed in ejectment unpartitioned. This error had been amended by a subsequent decree *nunc pro tunc* in the partition, of which proceeding plaintiff's immediate grantors were not notified: Held, that plaintiff was put to inquiry of title, and on the necessary examination of the proceedings in partition would have inquired into defendant's title, and that this amounts to notice thereof.—LORING V. GROOMER, Mo., 19 S. W Rep. 950.

120. VENDOR'S LIEN — Purchasers without Notice.—A purchaser of property, without notice of a vendor's lien thereon, takes the property free of such lien.—LEWIS V. HENDERSON, Oreg., 30 Pac. Rep. 324.

121. VILLAGE—Validity of Incorporation.— In *quo warranto* proceedings to determine the validity of the incorporation of a village it may be shown that the territory sought to be incorporated had not, at the time the petition for incorporation was filed, the requisite population.—POOR V. PEOPLE, Ill., 31 N. E. Rep. 676.

122. WATERS—Riparian Rights—Boundaries.—A fresh-water stream, which at low tide flows through a tidal channel, from which the tide wholly ebbs, does not constitute "low-water mark," within the meaning of the colony ordinance of 1641-47, providing that the title of owners of land adjoining tidal waters shall extend to "low-water mark," and such a channel is not a boundary to the land of the adjoining proprietors.—TAPPAN V. BOSTON WATER POWER CO., Mass., 31 N. E. Rep. 103.

123. WATERS — Surface Water — Flowage.— In an action against a railroad company for building an embankment and culvert which diverted the water from ordinary rains and caused it to overflow and injure plaintiff's land, a defense showing that plaintiff had warning of the danger, and could at slight expense have prevented the overflow by cutting a ditch on the line of his land, is not sufficient, if it is not further shown that by cutting the ditch he would not have injured contiguous land.—AUSTIN & N. W. R. CO. V. ANDERSON, Tex., 19 S. W. Rep. 1025.

124. WATER RIGHTS— Unless the prior appropriator is entitled to all the water of a natural stream, he cannot, in the nature of things, identify certain specific water as belonging to himself while the same remains in the natural channel; and, so long as he is able to secure the full amount of water to which he is entitled, he will not be heard to complain that others are diverting its waters.— SAINT V. GUERRERIO, Colo., 30 Pac. Rep. 335.

125. WILLS—Construction.—Under a will giving the income of a house to testator's two daughters while single, after their marriage to be divided among the survivors of his five children, providing that the property should not be sold, divided, or disposed of in any way till testator's youngest son was 25 years old, when, if thought best, it might be disposed of as his surviving children saw fit, and declaring that the husband of his daughters and wives of his sons should have no interest in the shares of his daughters and sons during their lives, and that, if any of his children died without issue, their shares should go to the survivors, the five children have power to sell the real estate, all being of full age, the daughters unmarried, and the youngest son 25 years old.—POPE V. SULLIVAN, Mass., 31 N. E. Rep. 684.

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